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IN THE

Supreme Court of the United States

October Term, 1942

No. 403

PHOENIX FINANCE CORPORATION,
a corporation of the State of Delaware,
Petitioner,

-vs-

IOWA-WISCONSIN BRIDGE COMPANY,
a corporation of the State of Delaware,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE.

RESPONDENT'S BRIEF

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FORBE PRINTING, INC., MANKATO, MINN.

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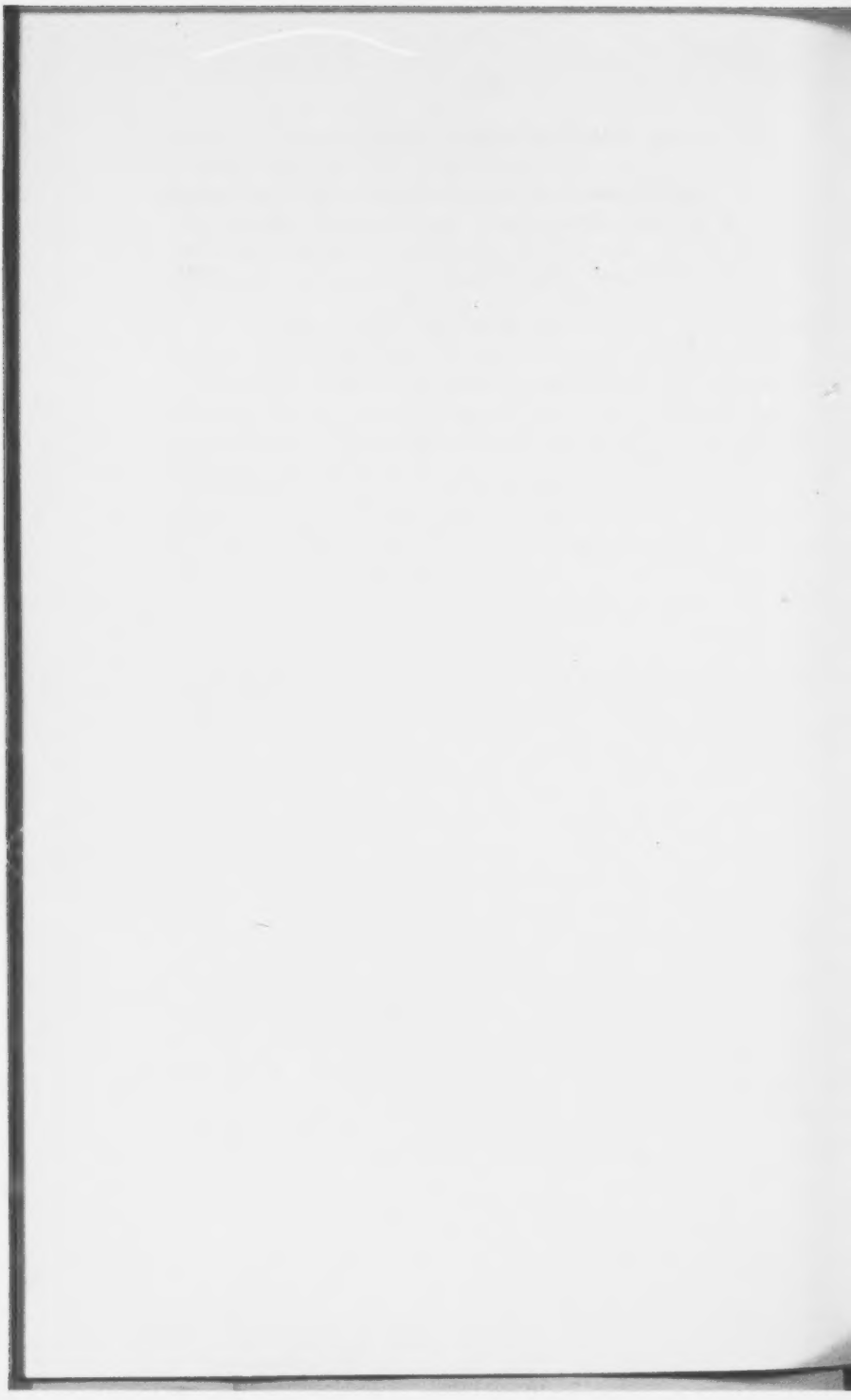

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the Supreme Court of Delaware is reported in 25A. (2d) 383. The Superior Court's opinion appears in 14A. (2d) 386; 40 Del. 500.

Opinions in the federal Foreclosure Cause are as follows: District Court, 19 F. Supp. 127; affirmed

Circuit Court of Appeals, 8th Circuit, 98 F. (2d) 416; Certiorari Denied U. S. Supreme Court, 305 U. S. 650, 676.

In a later proceeding supplemental and ancillary to the decree in the Foreclosure Cause an opinion of the District Court appears in 32 F. Supp. 277; opinion of affirmance in the Circuit Court of Appeals, 8th Circuit, 115 F. (2d) 1; certiorari granted U. S. Supreme Court, 312 U. S. 670, 61 S. Ct. 550, 85 L. Ed. 1112; reversed on a point not here involved, 62 S. Ct. 139; 86 L. Ed. 107; Adv. Ops. 16 and 19 October Term, 1941.

JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. Sec. 344 (b)).

Petitioner claims there is involved a question of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States. This claim is denied by respondent for the reasons following:

(a) That the record does not furnish any basis for such claim.

(b) This question is not shown to have been presented to the court below.

White River Lumber Co. vs. State of Arkansas 279 U. S. 692, 700.

Rule 12 Par. 1.

(c) The cases cited by petitioner on page 5 of its petition with respect to this contention are not in point, in that all those cases involved situations where the party sought to be bound by a former judgment was not a party, personally or by representation, or in privity with a party, in the case wherein the former judgment was rendered.

(d) Petitioner's claim of want of due process under the Fifth and Fourteenth Amendment to the Constitution was a matter for it to assert in the original case in the Federal Court and if its claim was there denied its remedy was to appeal to the Circuit Court of Appeals and ask a reversal on that ground, and if its appeal was denied, to petition this Court for certiorari on the same ground. It could not attack the decree collaterally on that ground when it was invoked against it in the Delaware Courts, nor can it thus collaterally attack such decree before this Court.

Roller vs. Murray 234 U. S. 738, 34 S. Ct. Rep. 902.

STATEMENT OF THE CASE.

Petitioner's statement (pages 7-13 of its petition) referred to in its Brief in Support at page 24, disregards the fact statement of the case made by the Delaware Supreme Court and is so inaccurate and incomplete that it is necessary for respondent to

submit a statement of the case.

The United States District Court for the Northern District of Iowa in the ancillary injunction case (32 Fed. Supp. 277) held that the matters here involved were previously adjudicated. This was affirmed by the Circuit Court of Appeals for the Eighth Circuit. (115 F. (2) 1) The Delaware Supreme Court also found that the matters here involved were previously adjudicated and that petitioner was bound by such adjudication. (R. 131-144, reported 25 A. (2) 383). *1

This Court has repeatedly held that the concurrent decisions of two courts upon a question of fact will be followed unless clearly shown to have been erroneous.

Brainard vs. Buck 184 U. S. 99

Dunn vs. Lumbermen's Credit Ass'n. 209 U. S. 20

Alabama Power Company vs. Ickes 302 U. S. 464.

However petitioner's assertions, it is necessary for us to make the following statement.

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*1 Wherever reference is made to the record in the Delaware Courts the letter "R." will be used in the reference, and where reference is made to Exhibits 4 the record in the United States District Court for the Northern District of Iowa, and in the United States Circuit Court of Appeals for the Eighth Circuit, the letters "F. R." will be used in the reference.

This is an action brought by petitioner based on two alleged promissiory notes of respondent,

on two alleged promissory notes of respondent, one dated December 15, 1932, due June 15, 1933 for $2,000.... and one dated January 20, 1933, due July 20, 1933, for $3,125.00, both alleged to be for value received by appellant and claim for interest on said alleged notes (R. pp. 4 to 11).

Defense *res adjudicata* and want of consideration as part thereof (R. pp. 13 and 29 and pp. 90 to 91).

The trial court rendered judgment in favor of petitioner. (R. 17) On writ of error to the Supreme Court of Delaware the judgment was reversed. (Decree R. 144-145; Opinion R. 131-144)

THE FACTS.

Jury was waived and trial was had to the court. Petitioner offered in evidence said notes, exhibits numbers three and four, which were received in evidence (R. pp. 30 to 32).

Respondent offered in evidence defendant's Exhibit 4, certified and exemplified record of the United States District Court for the Northern District of Iowa in the case of First Trust & Savings Bank and A. H. Schubert, as trustees, and Phoenix Finance Corporation, complainants, vs. Iowa-Wisconsin Bridge Company a corporation, defendant, and Fayette D. Kendrick, et al., interveners, and in connection with the offer asked that said proceedings of the United States District Court for the Northern District of Iowa be given full faith and credit under

Section 1, Article 4 of the Constitution of the United States and under Section 905 of the United States Revised Statutes (R. pp. 34 to 35, and 52), which was received in evidence.

Respondent also offered in evidence opinion of the United States Circuit Court of Appeals for the Eighth Circuit as contained in 98 Fed. (2) beginning at page 14, and certified copy thereof, defendants' Exhibit 1, and defendants' Exhibit 2, order of affirmance and defendants' Exhibit 3, mandate of the Circuit Court of Appeals, which were received in evidence (R. pp. 40 to 42 and 51), and offered in evidence defendants' Exhibit 5, transcript on original trial before the master in the Federal Court, not set forth in the record before this Court because already set forth in narrative form in exhibit 4. (Stipulation R. 148).

THE ORIGINAL BILL IN THE FEDERAL COURT.

The original bill in this case was filed by the First Trust & Savings Bank (formerly Bechtel Trust Company), resident of Iowa, and A. H. Schubert, a resident of Wisconsin, as trustees, versus Iowa-Wisconsin Bridge Company, a Delaware corporation, on or about August 28, 1933, for the foreclosure of an alleged $200,000 bond issue. The action was instituted at the request and instigation of petitioner Phoenix Finance Corporation, and carried on at the expense of and under the direction of said Phoenix Finance Corporation by attorneys of its selection (F.R. p. 537); Exhibit 28, H.E.B. F.R. pp. 789 to

791; especially bottom p. 790; Exhibit B, H.E.B., F.R. bottom p. 794 and top p. 795; Exhibits B-1, B-2, B-3, B-4, B-5, B-6, B-7, H.E.B. F.R. pp. 1478 to 1482; Exhibits B-6, on stationery Phoenix Finance System. predecessor Phoenix Finance Corporation, signed John A. Thompson, who was president of Phoenix Finance Corporation and of its predecessor (F.R. bottom p. 549).

The bill alleged jurisdiction based on diversity of citizenship, and alleged a deed of trust in the ordinary form of a mortgage trust deed securing a bond issue of $200,000.00, making it the duty of the bridge company to pay taxes on the mortgaged property (F.R. p. 31) to pay interest on the bonds, and to pay the bonds as they matured (F.R. p. 29). In case of default for a period of sixty (60) days, it was provided that the trustees "may," and upon the written request of the holders of twenty-five per cent of the bonds then in default "shall" declare the principal of all the bonds due (F.R. p. 35), and "shall proceed to protect and enforce their rights and the rights of the bondholders, under this indenture by a suit or suits in equity or at law * * * by * * * foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the trustees * * * shall deem most effectual" (F.R. pp. 37-38) and in addition to Section 13 (F.R. pp. 43-44) of the mortgage or trust deed, quoted from in the opinion of this court (98 Fed. (2) 416 at 420), it also provided: "Section 10. The company covenants that (1) in case default shall be made in the payment of any in-

terest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall continue for a period of sixty days, or (2) in case default shall be made in the payment of the principal of any such bond when the same shall become payable, whether by the regular maturity of said bond, or by declaration as authorized by this indenture, or by sale as provided in Section 6 of this article, or otherwise, then upon demand of the trustees the company will pay to the trustees, for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding, for interest or principal or both, as the case may be, with interest upon the over due principal and/or installments of interest of each such bond at the coupon rate, *and in case the company shall fail to pay the same forthwith upon such demand, the trustees in their own names, and as trustees of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.*

"The trustees shall be entitled to recover judgment as aforesaid, either before or after or during the pendancy of any proceeding for the enforcement of the lien of this indenture upon the trust property, and the right of the trustees to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien hereof; and in case of a sale of the mortgaged property, and of

the application of the proceeds of such sale to the payment of the debt, the trustees in their own names and as trustees of any express trust, shall be entitled to enforce payment of and to receive the amount then remaining due and unpaid upon any and all bonds issued hereinunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest. No recovery of any such judgment, by the trustees, and no lien of any execution upon property subject to the lien of this indenture, or upon any other property, shall in any manner or to any extent affect the lien of the trustees upon the trust property, or any part thereof, or any rights, power or remedies of the trustees or of the holders of the bonds hereby secured; but such lien, rights, powers and remedies shall continue unimpaired as before" (F.R. pp. 41-44). Emphasis supplied.)

The bill alleged that all of said bonds were duly made and executed on behalf of the company, duly presented to and authenticated by Bechtel Trust Company (trust company) as in said mortgage deed of trust provided, and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued for a *good and valuable consideration and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value.* Said bonds and interest coupons are valid obligations of said Iowa-Wisconsin Bridge Company, and are entitled to the benefit and secur-

ity of said mortgage deed of trust. The bill further alleged authority of the trustees to sue under the terms of the deed of trust, default and acceleration of due date, and prayed:

1. That an account may be taken of all property in the Northern District of Iowa subject to the lien of said mortgage deed of trust, and that said deed of trust may be decreed to be a valid first lien upon all and singular thereof.

2. That an account may be taken of the bonds and interest coupons secured by said mortgage deed of trust and the amount *due on the bonds* for principal and interest or otherwise, and the amounts expended or to be expended by your complainants, and that said Iowa-Wisconsin Bridge Company be decreed to pay to your complainants *the amount found to be due on such accounting* together with costs and expenditures in this proceeding and attorneys' fees by the court assessed, with a short day to be fixed by the court; * * *

3. * * *

4. That in the event the proceeds of such sale shall not be sufficient to satisfy in full the decree to be rendered in this suit that these complainants *have a decree* against said Iowa-Wisconsin Bridge Company *for the deficiency.*

5. For a receiver of all the property of the defendant.

6. For general equitable relief (F.R. pp. 10 to 11). (Emphasis supplied.)

An answer was filed on the part of the bridge company, which admitted diverse citizenship of the parties and admitted the issuance of certain bonds, but denied that said bonds were a valid and binding lien against the the real estate of the property of the defendant; denied that the complainant was entitled to the relief prayed for and denied every matter set out in the complaint not otherwise disposed of; admitted the execution of purported mortgage deed of trust but denied the validity thereof, and denied that the amount claimed on said bonds was actually due; alleged that a large part of the bonds were improperly executed and delivered; that the defendant did not have full and complete record of the issuance or transfer of said bonds nor the consideration received therefor; alleged the belief that there was a good defense to all or part of complainant's claim; alleged conflicting interests of common directors of the bridge company and Phoenix Finance System, Inc.; denied complainant's right to the appointment of a receiver, and prayed the court:

"To deny complainants the appointment of a receiver and to compel complainants to make a complete showing and accounting to this court of the method and manner in which bonds were sold and delivered, the consideration paid and received thereof and to compel complainants to show in what manner the bonds authenticated by the trustees were

disposed of * * * and to compel the complainants to make a complete showing as to the consideration received in each and every instance for the delivery of authenticated bonds," and prayed the protection of the court (F.R. pp. 62 to 66).

APPOINTMENT OF RECEIVER.

On Septemebr 28, 1933, the court appointed a receiver of all of the property of the bridge company of every kind and took the same into legal custody (F.R. pp. 68-72). The court then had full, complete and exclusive jurisdiction of the parties and the subject matter of the action.

INTERVENTION.

On December 5, 1933, by leave of court, Fayette D. Kendrick, a stockholder of the bridge company, and citizen of Minnesota, intervened on behalf of defendant, himself and all other stockholders similarly situated (F.R. pp. 73-83) praying that the complainant's bill be dismissed, the bonds cancelled and the the deed of trust set aside and for general equitable relief. He alleged that John A. Thompson and his associates, officers and directors of Phoenix Finance Corporation and its predecessor, Phoenix Finance System, Inc., dominated the bridge company, and by the exercise of such domination, fraudulently procured the execution and delivery of the deed of trust and the issuance of the bonds to corporations controlled by them; that all of the bonds and mortgage deed of trust were issued as a part of the fraudulent

scheme, plan and conspiracy without consideration, with intent to cheat and defraud the bridge company and its stockholders out of their property; that in pursuance thereof part of the bonds issued were fraudulently obtained by cancelling stock and that the bonds and mortgage were fraudulent, without consideration, invalid and void; that none of the bonds had passed to innocent purchasers for value without notice; that said John A. Thompson and his associates in conspiracy still were in control of the defendant bridge company and that demand by interveners to obtain relief from or through said defendant corporation would be unavailing (F.R. pp. 73-83; amendment to petition of intervention, F. R. pp. 100 to 102). On December 5, 1933, the court granted the intervention (F.R. pp. 85 to 86). The master and the court found that the bridge company was not making and would not have made a good faith defense to complainant's action had not the interveners intervened (F.R. pp. 160-183).

PHOENIX FINANCE CORPORATION MADE A PARTY TO SUBSEQUENT PLEADINGS.

The intervener made a motion that Phoenix Finance System, Inc., and certain other corporations be made parties (F.R. pp. 83-84, f. 119). The motion was granted. The court's order provided;

"The motion of Fayette D. Kendrick intervener to make additional parties plaintiff and defendant to the petition of intervention then came on for

hearing and complainant's counsel having stated in open court that the Phoenix Finance Corporation *has succeeded* the Phoenix Finance System, Inc., and is holder of the bonds involved in this action with the exception of about $10,000 worth of said bonds. It is hereby ordered and directed that the Phoenix Finance System, Inc., and the Phoenix Finance Corporation *be made parties plaintiff in this cause, and defendants to the petition of intervention* and the clerk of this court is hereby directed to issue the necessary processes and summons for said purpose." (Emphasis supplied.) (F.R. p. 86.)

Petition of intervention was ordered to stand as an answer on behalf of the bridge company to complainant's petition (F.R. p. 100).

On the 8th day of December, 1933, an amendment was filed to the answer by the bridge company, alleging that John A. Thompson and others associated with him dominated and controlled Phoenix Finance System Inc., and subsidiary or ancillary organizations and dominated and controlled the Iowa-Wisconsin Bridge Comany, and while acting for said corporations and controlling the Iowa-Wisconsin Bridge Company, and its board of directors as a part of the scheme fraudulently procured bonds of the Iowa-Wisconsin Bridge Company by cancellation of bridge company stock (F.R. pp. 67-68).

Subpoena directed to Phoenix Finance Corporation, making it a party, was duly served on said corporation (F.R. pp. 87-89, ff. 126-127). It

appeared (F.R. p. 89)

As stated by the Circuit Court of Appeals:

"Inasmuch as the District Court found that Phoenix Finance Corporation was in all respects, so far as concerns this case, the successor of Phoenix Finance System, Inc., and managed by the same officers, both corporations are hereinafter indiscriminately referred to as Phoenix" (98 Fed (2) 416 at 419).

On February 23, 1934, Phoenix Finance Corporation filed an answer to the petition of intervention on information and belief denying all the allegations thereof and alleging that it was the *owner and holder for value of a large amount of bonds of the Iowa-Wisconsin Bridge Company* issued in accordance with the mortgage declared on in the bill of foreclosure. (Emphasis supplied.) (F.R. pp. 91-92.)

The trustees filed reply to the petition of intervention denying the allegations thereof, etc. (F.R. pp. 102-103).

Intervener Fayette D. Kendrick, filed a petition for production of books and papers of Phoenix Finance Corporation (F.R. pp. 92-96), which trustees resisted. (F.R. 96-97) and the court ordered produced, (F.R. 97-98), but were not produced. (F.R. 614-616; 396-399).

Other stockholders of the bridge company, residents of Iowa, intervened, and adopted the pleadings filed by Kendrick (F.R. pp. 106-107).

APPOINTMENT OF AND PROCEEDINGS BEFORE MASTER.

Counsel for the parties agreeing, the court appointed a special master and entered an order of reference, which provided:

"It is ordered that this cause be and it hereby is referred to Honorable J. W. Kindig, Special Master in Chancery, to hear all of the issues in this cause, to take the evidence and proofs according to law, to examine the questions in issue and to report from said evidence his findings of fact and conclusions of law in respect to all of the issues herein, *to report his conclusions as to whether the evidence and pleadings entitle complainants or the other parties herein to the relief or any part thereof, prayed for in their respective pleadings,* and to perform all such other lawful services as may be necessary or proper in the premises, etc." (F.R. p. 107, ff. 108 to 109 inc., folio 169,) (Emphasis supplied).

On the trial before the master the trustees appeared by attorneys selected by the Phoenix and the Phoenix appeared by attorney W. B. Sloan (F.R. p. 331; F.R. p. 553; f. 945).

The complainants, trustees, and Phoenix Finance Corporation to support the allegation contained in their bill of complaint:

"That all of said bonds were duly made and executed on behalf of the (Bridge) company. * * * and that all of said bonds, together with interest coupons attached thereto evidencing interest thereon as aforesaid, have now been issued *for a good and valuable* consideration and are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value".

called John A. Thompson, president of complainant, Phoenix Finance Corporation, as a witness in their main case, who testified as to the claimed consideration for the bonds, and who was cross examined on the subject. (Direct examination, F.R. pp. 538-542; cross examination, F. R. pp. 542 to 545; cross examination on part of interveners, F.R. pp. 545-556; re-cross examination, F.R. pp. 560-561; further cross examination, F.R. pp.562-564; further cross examination on part of interveners, F. R. pp. 633-637; F.R. pp. 673-675; further direct examination of Mr. Thompson on part of complainants in rebuttal, F.R. pp. 675-678; cross examination on part of interveners, F. R. bottom pp. 666-685; F. R. pp. 691-692).

The claimed considerations involved in the case are summarized in the decision of the Circuit Court of Appeals, 98 Fed. (2) 416 at 424, (F.R. 1700-1701) as follows, to-wit:

"The consideration claimed by appellants to have

been paid by the parties to whom the bonds were issued may be summarized as follows:

To Phoenix in consideration of			
1. In exchange for its mortgage dated March 10, 1931,			
Principal of mortgage	$50,000.00		
Accrued interest	3,548.56		
Allowance to give 8% yield on bonds	12,727.31		
			$ 66,275.87
2. For advancements under guaranty contract of November 10, 1930,			
To Industrial Contracting Co.	10,000.00		
To McClintic - Marshall Co.	11,262.71		
			21,262.71
3. Paid Kramer & Hogg to discharge mechanic's lien			9,000.00
4. Cash			461.42
5. In Exchange for 517 shares of bridge company stock with accrued interest			60,500.00
6. As security for Payment of taxes	3,125.00		
Advancements	14,610.19		
		17,735.19	20,100.00

To attorneys as security for fee of	4,000.00	10,000.00
To Anderson for claim of	6,000.00	7,400.00
To five claimants for	5,000.00	5,000.00
	$15,000.00	$200,000.00

"It will be observed that of the total issue $22,400 of bonds were issued as security or in payment of claims against the bridge company by claimants other than Phoenix for obligations aggregating $15,000, and the remainder of the bonds in the sum of $177,600 were issued to Phoenix. The court and the master found that the $15,000 of claims were meritorious, and the decree provided for their payment by the receiver.

"The important issue in the case is the question of the sufficiency of the consideration for the $177,600 of bonds issued to Phoenix" (98 Fed. (2) 416, at 424). (F. R. 1700-1701)

The complainants by the testimony of their witness, John A. Thompson, president of the Phoenix Finance Corporation, claimed consideration for the bonds, as shown in the above summary. As to items 1, 2, 3, and 4 of said summary, see Thompson testimony on part of complainants (F.R. 541) and the minutes referred to in said testimony appearing in Exhibit 6 (H.L.B.) were offered in evidence by complainants (F.R. 980-981; F. R. 539; and Thompson testimony, F.R. 562-563 and Exhibit A-2 H.E.B. p. 843).

As to item 5 of said summary see Thompson's testimony on part of complainants (F.R. 541). As to item 6 of said summary as claimed consideration, (which includes the items here involved) see said Thompson testimony. (F.R. pp. 542 and 562-563 and Exhibit A-2 H.E.B. F.R. 843-844 and Exhibit B-28 H.E.B. F.R. 829 and F.R. 986.)

The alleged cause of action in the present case is based upon two promissory notes, one for $2000 dated December 15, 1932, and one for $3,125.00 dated January 20, 1933. The record in the foreclosure suit shows that the $2000 note was a part of the sum of $14,610.19 designated as "advances" in item 6 of the foregoing summary, and that the $3,125.00 note is the same as the first entry of item 6 referred to as "payment for taxes." For the total alleged indebtedness under item 6 in the amount of $17,735.19 bonds in the sum of $20,100 were issued to Phoenix.

As witness for complainants in their main case said John A. Thompson testified: "Then $20,100 in principal amount of bonds, being all of the remaining bonds, was issued as collateral to notes for funds borrowed from Phoenix Finance Corporation. The amount is seventeen thousand and odd dollars" (F.R. 542). Said Thompson prepared a memorandum, Exhibit A-2 (H.E.B.), and with respect thereto testified: "However, the memorandum shows that $20,100 face value of 'B' bonds are in the possession of Phoenix, having been deposited as collateral by the bridge company to notes issued by the bridge

company for borrowed money in the total principal sum of $17,735.19. The numbers of the Series B bonds aggregating $20,100 so held to secure the notes are as follows:

B-106 to 111, inclusive,	$100 each,	Total	600.00
B-119, 121-129 "	500 each,	"	5,000.00
B-130, 132-139 "	500 each,	"	4,500.00
B-131, B-132 "	5000 each,	"	10,000.00
	Total aggregate		20,100.00"

(F.R. pp. 562-563 and 844.)

On the 17th day of July, 1933, the Thompson-Phoenix controlled board of the bridge company passed a resolution that $20,100 of Class B bonds of the bridge company be pledged as collateral to a note of $12,110.19 to Phoenix and three other notes in the amount of $5,625 to Phoenix (the latter notes being one of $500; one of $3,125 and one of $2,000). (F.R. pp. 1028 and 1029, Ex. No. 28 H.E.B. shows issuance of collateral of said bonds to said notes, F.R. p. 829.)

The last three entries of item six of the foregoing summary relate to bonds held by others than Phoenix. (F.R. 542 and 842 and 844 and 827 and 829 and 986.)

A large amount of testimony and exhibits were offered in evidence to show the control by Thompson

and Phoenix of the Iowa-Wisconsin Bridge Company, and that the bonds were without consideration. This appears from the five volumes of record. Written briefs and arguments were filed (F.R. p. 693). The case was finally orally argued before the master on October 25, 1935, and submitted in its entirety (F.R. p. 694). Complainants' counsel in such oral argument stated:

"Mr. Fowler: There is a question in this case as to whether or not at this particular time the master should recommend that a decree of foreclosure be entered, and the question of which of the bonds are to participate be reserved or taken up at a later date. I don't suggest for a minute that this testimony will have to be reopened. It is whether we want to go at this in two parts. In other words, it is our contention that if any of these bonds are valid, then the foreclosure must be ordered. Then the next question is which of the bonds must participate. * * *

"As I have said in our opening argument, I think under this record you can use your own judgment, the master can use his own judgment as to whether he wants to decide this all at this time or whether he wishes to make a recommendation to the court ordering a foreclosure of the mortgage, the determination of which bonds shall participate to be taken up at a later recommendation."

To this Mr. Ontjes, representing the interveners, said:

"Mr. Fowler talks about piece-meal trials. Your Honor, we didn't enter into this trial as any piece-meal proposition. We had no piece-meal ideas in our mind when Mr. Green and I presented our citation in this matter for the taking of these depositions and this evidence. It is our contention that we are trying and submitting this case in its entirety at this time and if Your Honor feels, as we believe in this matter, that this mortgage and bond issue is fraudulent, then she flies out the window. There is no evidence here of any kind that anybody is an innocent holder of any of the bonds. Not a one. The record before you is that substantially, if not wholly, they are original payees of the bonds.

'Mr. Fowler: We represent all the bondholders" (F.R. pp. 644-695).

REPORT OF MASTER.

The master filed his report on March 10, 1936. The master found that John A. Thompson above named before the issuance of the said bonds and before the authorization of the said trust deed came into control and management of the defendant bridge company and that at all times during the times material the said John A. Thompson controlled the Phoenix Finance System, Inc. and other affiliated companies (F.R. 129 and 135).

As to the first four items of bonds in the above summary amounting to $97,000.00, he found them to

have been issued without consideration and to have fraudulent and void.

As to item five of the bonds in the above summary, the master found they were fraudulently obtained by the exchange and cancellation of 517 shares of the bridge company stock (F.R. p. 130). As to item six in the above summary of $20,100 of bonds, the master found that they were without consideration except as to $3,125.00 (F.R. pp. 133-134).

The master found as to the specific bonds which were collateral for the notes above mentioned involved in this Delaware suit (Finding 10):

"(i) That the remaining bonds, approximating $19,000 to $20,000 were issued to the Phoenix Finance Corporation as a security for a note of $3,125.00 given in part to secure the payment of that amount made by the said Phoenix Corporation on behalf of the bridge comany to pay taxes of the bridge company in the State of Wisconsin. That to the extent of the principal of, and interest on, the said note only the said bonds are valid, but to no other extent are these particular bonds valid."

"(k) That of the bonds above named issued to Phoenix Finance Corporation to secure the said note of $3,125.00 the amount of bonds not necessary for such security, approximating the sum of $16,975

are without consideration, obtained by a fraud and invalid" (F.R. p. 133 to p. 134).

The master in his conclusions of law stated:

"Paragraph 5. That under the facts above found, it is apparent as a matter of law that the complainants did not furnish the necessary proof in sustaining the validity of the bonds, except the bonds specifically named in paragraph 10 of the findings of fact, and the prima facie showing made in the first instance by the complainants has been overcome by evidence of the defendant and interveners excepting as to those bonds especially named as having consideration in paragraph 10 of the findings of fact, and all the said bonds not named in said paragraph 10 of the findings of fact as having a consideration are illegal and void because they were issued fraudulently."

"Paragraph 6. That excluding the said bonds specifically mentioned in paragraph 10 of the findings of fact as having consideration, approximately $112,375 of the balance of said bonds issued to the said Thompson and his companies, not in exchange for stock but on a fraudulently alleged consideration purporting to appear on the books of the Iowa-Wisconsin Bridge Company were issued without legal consideration and are therefore void" (F.R. p. 136).

EXCEPTIONS TO MASTER'S REPORT.

The Iowa-Wisconsin Bridge Company and interveners filed exceptions to the master's report as to said $9,000 and $3,125 issued to Phoenix Finance Corporation and as to foreclosure and as to assessment of partial costs. (F.R. pp. 150-155, particularly folio 224, 225 and 226.)

The interveners and defendant filed exceptions to the master's report (F.R. p. 148) exception 8 being:

"To so much of the fifth conclusion of law as makes the following exception to such conclusion, to-wit 'excet the bonds specifically named in paragraph 10 of the findings of fact' and to the seventh conclusion of law as makes exception in said par-such conclusion and to so much of the eleventh cnclusion of law as makes exception in said paragraph to said conclusions, as follows to-wit: 'Exception as hereinafter stated' and 'exception that the bonds named in paragraph 10 in the findings of fact as having been issued in good faith are valid and may be enforced accordingly.' " (F.R. p. 153 to and including p. 155 and 224 to 226.)

Exception No. 8 and intervener's exceptions 9 and 11 were sustained by the court in its final decree (F.R. p. 203).

The trustees, by counsel of Phoenix' selection, filed exceptions to the master's report (F.R. supp. trans. of record, pp. 3-14) asserting that said $97,000

of bonds were issued for good and valuable consideration (F.R. p. 12); and asserting that said $60,500 of bonds were issued for good and valuable consideration (F.R. p. 13); and that said $20,100 of bonds were issued for good and valuable consideration (F. R. p. 13).

And with reference to said $20,100 of bonds asserted in said exceptions—

"That Series B, Bonds, Numbers 106-111 inc., 119, 121-130, inc., in the aggregate principal amount of $20,100, were issued for a good and valuable consideration and that upon presentment the holders thereof are entitled to share ratably in the proceeds of the sale of the mortgaged property to the full extent thereof, subject only to the condition that the holders thereof shall not be entitled to receive in excess of the amount of their primary debt, $17,735.19, and interest. (See Exception No. 5; Des Moines Testimony, page 84, Exhibit A-2.)" (F.R. Supp. p. 13.)

Phoenix Finance Corporation appearing by W. B. Sloan and by additional counsel, filed full and complete voluminous exceptions to the master's report, claiming basic considerations for all of the bonds held by the Phoenix, re-defining with particularity the issues involved (F.R. Supp. pp. 14-58).

Phoenix in its exception number 5 asserted that $97,000 of bonds represented by the first four items in the above summary were issued and delivered to

it for valid consideration, stating "which valid consideration was the following;" then setting forth a tabulation, claiming the same consideration for said bonds as shown in the first four items of the above summary, as claimed by Phoenix (F.R. Supp. pp. 26 and 27).

In said exception five Phoenix claimed consideration for the $50,000 mortgage held fraudulent and without consideration by the master and the court (F.R. Supp. p. 27; F.R. p. 131; pp. 191-192) and claimed as consideration for said bonds items to Industrial Contracting Co. $10,000 and McClintic Marshall Co. $11,262.71, which the bridge company never owed (court's findings 32, 33, 34, 40, F.R. pp. 194-196 and 201-202) and other items which the court found the bridge company did not owe (F.R. bottom 177-178). Phoenix in its exception number four undertook to assert that the said $60,500 of bonds, item number five, in the above summary, were not procured fraudulently by cancellation of the 517 shares of stock, but were based on consideration (F.R. Supp. 23-26). The court found that this stock was cancelled when Phoenix Finance Corporation fraudulently obtained the bonds and that it was not entitled to have it reissued (F.R. p. 413).

And Phoenix with particularity excepted in its exception number six (F.R. Supp. 48) to the master's report with respect to the notes now in issue in the present case, asserting that the aforesaid $20,100 of bonds had basic consideration, stating in said exception the following, to-wit:

"EXCEPTION NO. 6.

"It excepts to fact finding 10 (i) and (k), (Master's Report, pages 23 and 24) wherein the master refers to bonds of $19,000 to $20,000 and finds them to be a valid pledge for principal and interest on a note of $3,125.00 from the bridge company to Phoenix Finance Corporation, but invalid to the extent of $16,975.00 as without consideration and fraudulent."

"This finding is erroneous for the following reasons:

I.

"This pledge of $20,100.00 of Series B bonds was made by the bridge company to secure its four promissory notes to Phoenix Finance Cororation. (Minutes, Exhibit 31, page 402, and intervener's chart, Exhibit B28). The existence of these four notes, aggregating $17,735.19 principal amount, is without dispute in the record. The notes are as follows:

"(a) Note for $2,900.00 dated 12-15-1932, due 6-15-1933, at 8%, represents cash borrowed and deposited to credit of bridge company in Iowa-Des Moines National Bank & Trust Company. (See bridge company journal, Exhibit 1, page 107, line 16, and bridge company ledger, Exhibit 2, notes payable account.)

"(b) Note for $500.00, dated 12-31-1932, due 6-31-1933, at 8%, to apply on account of cash loaned to bridge company both by direct transfer of cash and payment of bridge company debts by Phoenix Finance Corporation. (See same journal, page 110, lines 5 to 7, and same ledger, notes payable account.)

"(c) Note for $3,125.00, dated 1-20-1933, due 7-20-1933, at 8%, representing cash loaned and deposited by bridge company in Iowa-Des Moines National Bank & Trust Company. (See same journal, page 114, lines 30 and 31, and same ledger, notes payable account.)

"(d) Note for $12,110.19, dated 7-7-1933, due on demand at 8%, representing cash loaned to bridge company by direct transfer of cash and payment of bridge company debts by Phoenix Finance Corporation. (See same journal, page 130, lines 1-12, and same ledger, notes payable account.)

"The execution and consideration for these four notes are corroborated and explained by bridge company minutes hereinafter referred to and by testimony of John A. Thompson, namely Thompson's Des Moines testimony, page 84, lines 16-21, as follows:

" 'Then $20,100, being all of the remaining bonds, were issued as collateral to notes of the Phoenix Finance Corporation. These notes were for funds borrowed from Phoenix, the amount owing is $17,000 and some odd cents, and $12,000 note and some

smaller notes.' (Also see Thompson's Des Moines testimony, page 90, line 10, to page 93, line 13, and pages 228, lines 7 to 25, and Exhibit A-2)"

It will be noted that in the foregoing exception number six Phoenix not only asserted the notes as claimed original underlying consideration of said unclaimed original underlying consideration of said notes as consideration for the issuance of the bonds. The notes described in paragraphs (a) and (c) of said exception quoted above are the same as those involved in this present action. This was admitted in the present action in the Superior Court (R. 54-56).

Petitioner states in its petition (page 12): "There was no finding of fact either of the master or the trial court referrable directly or indirectly to the $2,000 note in suit." Such assertion is not supported by the record, as shown by Phoenix' said exception number six, which continues:

"The master makes no reference to note herein designated (a) for $2,000.00, but disallows it without stated reason or reference, as being without consideration and fraudulent. The master clearly erred because this was a plain loan of cash by Phoenix Finance Corporation to the bridge company and the money was deposited in the bridge company account in the Iowa-Des Moines National Bank & Trust Company. (Emphasis supplied.) (Citing exhibits)

3.

"The master makes no reference to notes herein designated (b) and (d) (the $500 note and the $12,-110.19 note referred to in Finding 7-c *infra) but without stated reason or reference disallows them both as without consideration and fraudulent. These notes grow out of the same source and are analyzed together.* (Emphasis supplied.) From late 1931 to the middle of 1933, being a period long after the bridge was built, the bridge company was in dire need of money. Phoenix Finance Corporation loaned the bridge company cash both by direct transfer of money which was deposited by the bridge company in its bank account and also by Phoenix Finance Corporation paying debts and liabilities of the bridge company.

4.

"The master correctly allowed note (c) for $3,-125.00 which was cash loaned to the bridge company and by it deposited in the bank and used to pay taxes in Wisconsin, but incorrectly found that this collateral pledge of bonds was valid only to the amount of the principal and interest of said note. He should have held the entire pledge of bonds valid until the obligation secured thereby was paid in full.

5.

"The indebtedness for which these four notes was given could not be held fraudulent on this record

and the master erred in so finding. It was incurred long after the bridge was built and under full knowledge and authorization of the bridge company directory board composed of directors who were concededly not 'Thompson men or associates.'

6.

"The debt evidenced by these four notes was incurred by a directory board against which there is not a breath of suspicion. It represents cash—borrowed by the bridge company—in a time of need —when it couldn't borrow elsewhere. The four notes ought to be allowed in full, with interest thereon, and this $20,100 pledge of bonds should be held valid until the debt is fully paid" (F.R. Supp. pp. 48-52).

OPINION OF COURT, FINDINGS OF FACT AND DECREE.

The trial court, after hearing the various exceptions, rendered its opinion, findings of fact and final decree (F.R. 156-204) holding that all of the bonds held by the Phoenix were issued without consideration and as a part of a fraudulent scheme, plan and conspiracy to cheat and defraud the bridge company and its stockholders out of their property (F.R. pp. 156-179).

The court in its opinion said:

"Phoenix Corporation's exception No. 6 chal-

lenges the master's findings of fact No. 10" (F.R. pp. 164-165).

"Defendants and interveners' exception to such conception challanges so much of the master's fifth conclusion of law as makes the following exception to such conclusion: 'Except the bonds specifically named in paragraph 10 of the findings of fact;' and to so much of the master's eleventh conclusion of law as makes exception to such conclusion, because the record does not warrant the exceptions" (F.R. pp. 165-166).

With reference to these exceptions the court said:

"This conclusion of law is attacked in the defendant and interveners' eighth exception. I think that insofar as the language of the master's conclusion includes $9,000 of bonds held valid in the hands of the Phoenix Finance Corporation, and the $3,-125.00 in bonds held valid in the hands of the Phoenix Finance Corporation, it is erroneous. *What I have said with respect to the legal status of the Phoenix Finance Corporation as the successors of Phoenix Finance System, Inc., places it completely upon the level with its predecessor so far as equities are concerned. With full notice it has adopted everything its predecessor did. and with full notice that its predecessor had at the outset taken 140 shares of stock of the bridge company without paying any subscription price therefor and has not accounted for it"* (F.R. pp. 177-178). (Emphasis supplied)

"In view of the conclusion of the court, a decree should be entered overruling the exception of plaintiff trustees, numbered one to eight, inclusive, and of Phoenix Finance Corporation, numbered one to six, inclusive, and exceptions reserved to the respective plaintiffs * * * and sustain defendant and interveners' exceptions numbered eight, nine and eleven with exceptions reserved to the plaintiffs" (F.R. p. 178).

The findings of fact of the court appear on pages 179 to 202, inclusive, of the first record.

The court first takes up the findings of the master, and approves only those portions of findings 10 (i) and (k) which find that bonds approximating $19,000 or $20,000 were without consideration, obtained by fraud and invalid. The court disapproved the finding of the master that $3,125.00 of the bonds had consideration and were valid (F.R. 179).

In addition to approving the findings of the master, the court made a number of additional findings, the most pertinent of which are the following:

"8. That Phoenix Finance Corporation, complainant, and defendant to petition in intervention, is the successor in interest of Phoenix Finance System, Inc., and subject to all defenses and offsets to which said Phoenix Finance System, Inc., was at any time subject (F.R. p. 185).

"9. That this action was instituted by the plaintiffs herein as trustees upon the demand of Phoenix

Finance Corporation, as owners and holders of $177,600 of the $200,000 of the bonds involved herein.

"That said Phoenix Finance Corporation, referred to, agreed to secure and indemnify said trustees against all costs, expenses and liabilities incurred by them in taking the action demanded; and also designated the attorneys to be employed by the trustees and agreed to save the trustees harmless on account of any claim by said attorneys for fees and expenses in connection with the litigation" (F.R. pp. 185-186).

"John A. Thompson was interested in and with his wife, M. K. Thompson, and associates, A. B. Wilder and Emory H. English, controlled the Phoenix Finance System, Inc., and other affiliated companies. Thompson & Company was a wholly owned subsidiary of the Phoenix Finance System, Inc. M. White was John A. Thompson's secretary and an officer of Phoenix Finance System, Inc.

"In October and November, 1930, through negotiations with John W. Shaffer and Vernon W. O'Connor, John A. Thompson became president of and acquired control of the bridge company. At about the same time, the number of directors of the bridge company was increased and Thompson, together with other directors of the Phoenix Finance System, Inc., became directors of the bridge company. From that time on, Thompson controlled the bridge company" (F.R. 188).

The court found that said Thompson and his affiliated companies controlling the bridge company so manipulated its books as to cause false entries to be made thereon, as to make it appear that sums were received and paid out, which were neither received by nor paid out for the bridge company. (See court's finding No. 8, F. R. 181; and finding No. 26, F. R. 191-192, and finding No. 29, F.R. 193-194, and finding No. 40, F.R. 201-202; court's opinion F.R. bottom page 176 and top page 177.)

By its findings numbers 27, 28, 29, 30 and 41 the court found that as a result of various fraudulent transactions Phoenix had become indebted to the bridge company in amounts which aggregate $26,085.85, $14,000 thereof being for stock of the bridge company, which the Phoenix received and disposed of without payment therefor to the bridge company (F.R. pp. 192-194, both inclusive; F.R. 202). The court in its finding number 41 found:

"That the Phoenix Finance Corporation, at the time it was organized, was officered and controlled by the same officers as Phoenix Finance System, Inc., and took over the succession both of assets and liabilities, with full notice of the facts and circumstances surrounding the bond issue in controversy in this case, and assumed the entire fruits and activities of its predecessor, so far as concerns this case, and proceeded to carry on with the same notice and purpose, adopting all of the plans and results of its predecessor." F.R. 202; also see on the same subject court's opinion F. R. p. 176.)

The court found that $15,000 in bonds held by individual parties other than the Phoenix had consideration and in its decree made provision for them (F.R. p. 204).

The court in its decree specifically overruled the exceptions of plaintiff trustees numbered 1 to 8, inclusive, and of Phoenix Finance Corporation numbered 1 to 6, inclusive, and sustained defendants' and interveners' exceptions numbers 8, 9 and 11 and decreed "that the mortgage and bonds in suit were fraudulently issued; that all bonds are without consideration, with the exception of bonds aggregating $15,000 hereinafter specified. That the bill of the plaintiff be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except insofar as the decree provides for the protection of the holders of said $15,000 of bonds" (F.R. p. 204).

MOTIONS OF PHOENIX AND TRUSTEES TO VACATE DECREE, FOR DISMISSAL, FOR REHEARING AND FOR MODIFICATION

On the 19th day of December, 1937, Phoenix Finance Corporation filed a motion to vacate, and expunge and set aside the decree, findings of fact, opinion, etc., on the claimed ground of want of jurisdiction (F. R. pp. 204-205), to which motion the bridge company filed a resistance (F.R. pp. 206-208). The motion was overruled (Supp. opinion of the court, F.R. pp. 208-211).

On January 29, 1937, the trustees by counsel of Phoenix' selection filed a motion for dismissal and in the alternative petition for rehearing, division one claiming want of jurisdiction as claimed in Phoenix Finance Corporation's prior motion, and asking dismissal; division two in the alternative petition for rehearing, *adopting the petition for rehearing of the Phoenix Finance Corporation, verified by John A. Thompson, president of Phoenix Finance Corporation* (F.R. pp. 211-214).

On the 29th day of January, 1937, Phoenix Finance Corporation by W. B. Sloan and other counsel filed petition for rehearing and in the alternative for modification of decree (F.R. pp. 216-391) alleging that a misunderstanding occurred between the master and counsel in taking of the testimony as to the scope of the questions and issues which were on trial and the method of trial procedure which was to be followed; that the only question properly to be considered was in reference to the validity of the mortgage deed of trust and right of foreclosure thereunder and that the question of the validity of any of the bonds would be determined after the determination of the question of foreclosure. That counsel did not introduce additional evidence on their behalf showing consideration for and validity of the bonds, but assumed that such matters would be taken up at a subsequent time, and the Phoenix attached thereto the affidavits of claimed witnesses with respect thereto, including the affidavit of John A. Thompson, who testified on the trial with respect to the claimed considerations, Phoenix in said petition

again claiming that the notes mentioned furnished a consideration for said $20,100 of bonds (F.R. 216-223). Paragraph 12 of the petition (F.R. pp. 219-220) refers to a number of affidavits attached to the petition and states:

"The ultimate facts which can and will be proved on this point are that the bridge company knowingly procured large amounts of cash and full and fair consideration for the bonds now held by the Phoenix Corporation."

The petition for rehearing refers to an affidavit of M. K. Thompson, wife of John A. Thompson, in which the aforesaid notes and *claimed underlying considerations* thereof are again set forth as claimed consideration for the bonds (F.R. pp. 325-326). And the petition refers to affidavits by L. J. Skoner and W. S. Gault, by which it is again asserted that the notes in question and the claimed underlying consideration thereof furnished consideration for said $20,100 of bonds (Gault F.R. p. 278; Skoner F.R. pp. 308-319, 315-319, 323). No allegation of diligence or that any evidence was newly discovered was contained in the petition.

The petition prayed:

"First: That a rehearing be granted herein and that it be given leave to present the new evidence aforesaid. * * *

"Fourth. *In case rehearing is denied, that the decree be modified so as to withhold from adjudica-*

tion the right of petitioner to institute an action at law against the bridge company, if it so desires, for money had and received."

Petition verified by John A. Thompson, president *of Phoenix Finance Corporation (F.R. pp. 206-223 and 224-391).*

On the 18th day of February, 1937, the bridge company and interveners filed answer to the petition for rehearing and modification of decree supported by affidavits, alleging among other things, that this cause was pending for about two years before the hearing before the master, during which time numerous depositions were taken with respect to the fraudulent issue of the bonds and want of consideration of such bonds, and the fraudulent character of the deed of trust, which depositions were all on file six months or more before the trial and hearing before the master commenced, and that complainants were at all times fully advised that all of the issues were involved in the hearing and had ample opportunity to present any and all evidence on their part that they deemed to have foundation or to be relevant, pertinent or material; that there was not a single affidavit presented in support of the petitions nor was it claimed that any of the facts stated in the affidavits constituted newly discovered evidence that the whole mass of affidavits filed in support of the motions constituted mere repetition and accumulation of evidence taken at the trial and contained in the record, or at least evidence which could have been offered if

complainants had so desired (F.R. pp. 494-498). * * * That John A. Thompson was presented as a witness and examined on direct examination by complainants and cross examined, and further examined on direct examination by complainants as to the validity of the bonds; that the whole field of the alleged considerations of the bonds was covered in the depositions taken preparatory to trial and in the evidence taken at the trial in detail; that it was at all times contended by the interveners that all of the issues were on trial before the master—the question of the validity of the bonds and the want of consideration and the invalidity of the deed of trust (F.R. p. 405). And the answer further otherwise fully answered all of the claims of the petition for rehearing and modification of decree. (F.R. pp. 394-410; also see John A Thompson deposition taken prior to trial, F.R. pp. 414-500.)

ORDER OF COURT ON MOTIONS OF TRUSTEES AND PHOENIX.

On the 18th day of February, 1937, the motion of Phoenix and the trustees to vacate the decree for want of jurisdiction and petitions for rehearing were heard and on the 4th day of March, 1937, the court filed its order and opinion, denying said motion and petitions (F.R. pp 411-413). The court in its opinion stated:

"The petition for rehearing, filed by Phoenix Finance Corporation and adopted by the plaintiff trus-

tees, rests upon the claim that the master to whom the cause was referred in its entirety, received the submission under a misapprehension, and that the plaintiffs had also been of impression that they were to take further testimony at some future time when they submitted their bonds to the master or to the court. They further contend that the cause in behalf of the trustees and the Phoenix Finance Corporation was mismanaged by their counsel, and that now, having taken in new blood at the bar, the present counsel should be given a chance to try the case over.

"Having in mind the analogy of petitions for rehearing in equity cases and motions for new trial in law causes, the court is unable to find any substantial merit in any of the claims for a rehearing. The defense interposed to the plaintiffs' cause of action was that the bond issue and mortgage securing the same were all a part of a deliberate fraudulent scheme to obtain possession and ownership of the bridge after its completion and freeze out all of the stockholders. This scheme, as alleged and as proven, dated back to the inception of a certain $50,000 mortgage, and proceeded forward including the plans and their execution for the issuing of the bonds and mortgaging of the bridge. During all of this time the Phoenix Finance System, Incorporated, and its successor, Phoenix Finance Corporation, and the bridge company had interlocking directorates. The so-called Thompson interests predominated in all of them. As the master pointed out in his forth conclusion of law, in the circumstances with the charge

of fraud and conspiracy made, the burden was on the plaintiffs who had brought the suit at the instance of the Phoenix corporations, to show clean hands and fair dealing. This the plaintiffs not only failed to do, but throughout combatted the interveners who were permitted to defend in behalf of the bridge company. The interveners obtained an order of court for the production of the books and records of the Phoenix Finance Corporation before the master, but Phoenix Finance Corporation vigorously and successfully, it appears, prevented the production of those books and records, and its officer when on the stand before the master, declared his inability to produce, for they had been sent to the State of Florida. It is now with poor grace that the plaintiffs invoke the discretion of the court for a rehearing in order to use those very books and records. Anticipating an adverse ruling, the petitioners alternatively pray for a modification of the decree with provisions commanding the re-issuance of certain shares of stock to Phoenix Finance Corporation, which it canceled when fraudulently obtaining the bonds. One might conceive some invidious analogies to this situation. Having attempted the strong box of another, and being hoist by what is now claimed to be a premature explosion, they volubly invoke the compassion of the court to restore valuable implements of their craft left behind. I see no reason why a court of equity should be deeply concerned in giving an affirmative relief to the Phoenix Corporation. On the other hand I think the petitions for rehearing should be denied and the motion

to dismiss and vacate the decree overruled, and it will be so ordered" (F.R. pp. 412-413).

APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS.

The trustees and the Phoenix Finance Corporation appealed from the opinion, findings of fact and final decree and from the court's ruling on motions to vacate the decree and the court's ruling on petition for rehearing and modification of decree to the Eighth Circuit Court of Appeals, appearing by new counsel, Lon O. Hocker and Vincent L. Boisaubin of the firm of Jones, Hocker, Gladney & Grand of St. Louis, Missouri. The trustees filed assignments of error and the complainant, Phoenix Finance Corporation, filed assignments of error (F.R. 501-528).

The assignments of error, both of the trustees complainants and of the Phoenix Finance Corporation complainant, assigned error on substantially every ruling and finding of the court. In both assignments it was again urged that the $20,100 of bonds were given to secure four notes aforesaid ($2,000.00, $3,125.00, $500.00, $12,110.19) of the bridge company aggregating $17,735.19, and were collateral for loans and advancements, and that the court erred in holding that they were without consideration. (Trustees' assignments 9, 12, 14 and 19 F. R. 505-506; Phoenix' assignments 14, 15, 47, 49, 55 F.R. pp. 511-512, F.R. 524-525-526.)

Both the assignments of the trustees and Phoenix

on the opinion of the court holding that the master erred in holding that the $9,000 of bonds and $3,125 of bonds in the hands of the Phoenix were valid and that the court erred in failing and refusing to sustain the validity of the bonds to the extent of the two amounts aforesaid in the hands of Phoenix (F. R. 505 and pp. 524 and 525). Both the trustees' complainants and Phoenix' complainants assignments of error also assigned claimed errors based on the court's decree, each assigning among others, the following:

Trustees' assignments:

"14.

"The court *erred in adjudging and decreeing* that all bonds are without valid consideration with the exception of the following bonds, aggregating $15,000. * * *

"19.

"The court erred in failing to adjudge and decree that all of the bonds issued to the Phoenix Finance Corporation, totaling $20,100, as collateral for loans and advances were valid" (F.R. 505-506).

Phoenix' assignments:

"49.

"The court erred in *adjudging and decreeing,* with the exception of bonds aggregating $15,000, that all bonds are without valid consideration."

"51.

"The court erred in decreeing that the bonds issued to Phoenix Finance Corporation were without consideration, and erred in failing to include in its decree that, even if the bonds, as such, were invalid for any such reason, the decree should be without prejudice to the right of Phoenix Finance Corporation to institute an action at law against the bridge company for money had and received for advances of money claimed to have been made for the use and benefit of the bridge company, provided said action be brought within such time as the court deemed to be fair and just."

"52.

"The court erred in its decree which denied the prayer of the bill, except in so far as the decree provides for the protection of the holders of said $15,000 in bonds."

"53.

* * *

"55.

"The court erred in failing to adjudge and decree that all of the $20,100 of bonds issued to the Phoenix Finance Corporation as collateral for loans and advances were valid" (F. R. 525-526).

Both the trustees' complainant assignments and Phoenix' complainant assignments of error assigned claimed error in the court's ruling on their petition for rehearing or modification of decree (F.R. 507 and 528-529).

The record shows without dispute that the four notes, $2000.00, $3,125.00, $500.00 and $12,110.19, respectively, and the purported indebtedness which they represented were specifically passed upon. The notes were referred to in the minutes of Thompson-Phoenix-controlled directors, purporting to authorize the issuance of the $20,100 of bonds (F.R. pp. 1028-1029), the $2000 note was referred to in the minutes in the figure $5,625.00, which it clearly appears from exception number 6 consisted of the $2000 note, the $500 note and the $3,125 note. In the testimony of the witness, John A. Thompson (F.R. p. 563) he states: "However, the memorandum shows that the $20,100 face value of B bonds were in the possession of Phoenix, having been deposited as collateral by the bridge company to notes issued by the bridge company for borrowed money in the total sum of $17,735.19." The four notes making up this amount are shown on the notes payable account of the bridge company ledger entitled "Phoenix Finance System, Inc." (F.R. p. 1103), which is referred to in Phoenix' exception number 6 quoted *supra,* and the $2000 note dated December 15, 1932, the $500 note dated December 31, 1932, the $3,125.00 note dated January 20, 1933, the $12,110.19 note dated July 7, 1933, were specifically set out in the affidavit of Mrs. M. K. Thompson, wife of John A. Thompson (F.R. pp.

325-326), and the claimed underlying indebtedness checks for $2,000 and $3,125 at page 325, while a purported copy of the checks is attached to affidavit of Lee J. Skoner (F.R. pp. 315 and 319).

Moreover, the exact relationship of the $2000 note, the $500 note, the $3,125 note and the $12,-110.19 note; the $17,735.19 total and the $20,100 of bonds, is shown on the statement, Exhibit B-28, H.E.B. (F.R. p. 829) which was before the master (F.R. p. 562).

There can be no question from a reading of the record as to the inclusion of the $2000 note, the $3,125 note, the $500 note and the $12,110.19 note and the claimed indebtedness which they purport to represent in the findings of the master, of the United States District Court and of the Eighth Circuit Court of Appeals. The latter court in its decision said:

"The last $20,100 of bonds were issued to Phoenix as collateral to secure a purported indebtedness of $17,735.19. The master disallowed all but $3,125 which was used to pay taxes. This is a just claim, but is more than offset by the $14,000 and other items referred to above. $9,806.10 of the amount were furnished by Phoenix to pay interest on bonds held by Phoenix, which were known by the officers of Phoenix to be fraudulent. The transaction amounts to no more than a manipulation to obtain more bonds and increase the secured claim against the bridge company. $1505.75 were charged for sal-

aries to Phoenix officers and employees. We find no argument of appellants in defense of this item. The remainder of the claim is for cash items alleged to have been advanced by Phoenix to the bridge company, which, if allowable, are wiped out by the indebtedness of Phoenix to the bridge company." 98 Fed. (2) 416, at 426. (F.R. 1704-1705).

The Phoenix Finance Corporation, complainant, filed petition for writ of certiorari in the Supreme Court of the United States, which was denied. (Reported *Phoenix Finance Corporation, Petitioner v. Iowa-Wisconsin Bridge Company, et al.*, No. 438. Oct. Term, 1938; 305 U. S. 650, 59 S. Ct. Rep. 243.) Petition for rehearing denied. (305 U. S. 676, 59 S. Ct. Rep. 356.)

The mandate of the United States Circuit Court of Appeals for the Eighth Circuit to the District Court of the United States for the Northern District of Iowa was duly issued and filed in the office of the clerk of the latter court on the 5th day of April, 1939 (R. 128).

The present case on the two notes, one of $2000 and one of $3,125 is simply an attempt to re-litigate matters determined by the federal courts. Those notes and the claimed indebtedness which they purport to represent were directly put forward as the considerations for bonds involved in the federal case.

It was admitted on the trial of the present case in the Superior Court that the notes sued on in this

action are two of the notes set forth in Phoenix' exception number six to the master's report (R. 54-56; F. R. Supp. 48-49).

SUMMARY OF ARGUMENT

The Federal Court in the original suit, the judgment in which was pleaded as res adjudicata in this case as a contested issue decided the question of its jurisdiction based on diversity of citizenship and determined that the making of petitioner Phoenix a party co-complainant did not oust the jurisdiction of the court and that federal jurisdiction existed to determine the entire controversy. That an appeal was taken from such determination to the Eighth Circuit Court of Appeals and the same affirmed, and certiorari denied by this Court, and that such determination of jurisdiction is res adjudicata, and could not be attacked collaterally, as attempted in the instant case, when the judgments and decrees of the federal courts were offered in bar in this case. The federal courts have the power to determine their own jurisdiction based on diversity of citizenship, which determination may be appealed from to the Circuit Court of Appeals and brought by writ of certiorari to this Court, but when such determination has been made as a contested issue it cannot be attacked collaterally in another suit between the same parties when the judgment is offered in bar as res adjudicata.

The Federal Court had full and complete jurisdiction. The bonds and their underlying considera-

tions and the deed of trust were inseparably involved in one controversy; the trustees were the only indispensable parties complainant. The trustees filed the original bill and thereafter prosecuted the action at all times diligently. Prior to the filing of the petition of intervention the bill and answer of the defendant had been filed and receiver had been appointed of all of the bridge company's property of every description and the same was in the legal custody of the court and the court then had full, complete and exculsive jurisdiction of the subject matter and of the parties. The joining thereafter of petitioner Phoenix as a party co-complainant did not oust jurisdiction. The court had acquired complete jurisdiction prior thereto when the receiver took possession. The petitioner Phoenix was fully represented by the trustees. The joining of Phoenix as a party co-complainant was merely ancillary.

The cases cited by petitioner are not in point.

Petitioner was fully represented by the trustees in the foreclosure cause. The trustees under the deed of trust were fully empowered to bring any action either at law or in equity for the recovery of the claimed pre-existing indebtedness, for the security of which the mortgage deed of trust was given.

One who prosecutes or defends an action in the name of another to establish or protect its own right or to assist in the prosecution or defense of an action in aid of some interest of his own is bound by the judgment rendered therein.

The federal courts had full and complete jurisdiction to determine the matters involved in this cause. They were fully within the issues and were controverted and litigated in the federal cause. As stated by the Supreme Court of Delaware the question of the consideration of the notes in suit as considerations for the bonds were fully within the issues in the foreclosure case.

Courts are not limited to pleadings and the decree in order to determine the issues of a former case and the effect of the adjudication thereof. What was determined in a former case is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties and the findings and opinion of the court.

The doctrine of res adjudicata does not depend upon affirmance and denial of a particular proposition in the pleadings of the former suit but on the fact that the proposition has been fully and finally adjudicated and tried.

The rule of the federal courts and of the courts of Iowa as to what constitutes res adjudicata are the same. Petitioner's assertion that it was necessary that there be a pleading of counterclaim or set-off in the federal case is without merit since that is only a collateral attack on the judgment and decree of the federal court and a matter which could only be claimed on direct appeal from such judgment on an assignment of error. Phoenix made such an assign-

ment of error in its appeal to the Circuit Court of Appeals and the assignment was overruled and that is res adjudicata.

The notes in suit were determined in the federal case not to constitute a pre-existing debt supporting the bonds for the security of which the mortgage was given.

A successful defense to an action on collateral bars an action on the claimed indebtedness.

ARGUMENT

1.

The Federal Courts in the original suit the judgment in which was pleaded as res adjudicata in this case, having decided the question of diversity jurisdiction as a contested issue, those decisions became res adjudicata and could not again be inquired into.

Petitioner's first ground of argument is that the District Court in the foreclosure cause was without jurisdiction under Article IIII Section 2 of the Federal Constitution to render an adjudication against Phoenix with respect to the $3125.00 and $2000.00 notes asserted as a consideration for bonds.

The bill of foreclosure was filed on October 28, 1933 by a citizen of Iowa and a citizen of Wisconsin, trustees, as complainants, against the respondent, a citizen of the State of Delaware. The bill alleged

jurisdiction based on diversity of citizenship. (F.R. 2) On the same day the trustees moved for the appointment of a receiver. (F.R. 60) On August 25, 1933 respondent bridge company filed an answer. (F.R. 60-66) On September 28, 1933 the court appointed a receiver of all the property of the bridge company of every kind and took the same into legal custody. (F.R. 68-72) The court then had full, complete and exclusive jurisdiction of the parties and the subject matter of the action. On December 5, by leave of court a citizen of Minnesota intervened on behalf of respondent and all other stockholders similarly situated. (F.R. 78-83) The court ordered that the petition of intervention stand as an answer on behalf of respondent bridge company. (F.R. 100)

After the filing of the petition of intervention and on December 5, 1933 Phoenix Finance Corporation, petitioner here as successor of Phoenix Finance System, Inc., and as a holder of all bonds involved in the action, with the exception of about $10,000.00 worth was by order made a party plaintiff in the cause and defendant to the petition of intervention. (F.R. 87-89) On February 23, 1934 petitioner filed an answer to the petition of intervention, alleging among other things, that it was the owner and holder for value of a large amount of bonds of the Iowa-Wisconsin Bridge Company issued in accordance with the mortgage declared on in the bill of foreclosure. (F.R. 91-92) The trustees filed a more complete reply to petition of intervention as amended. (F.R. 101-103) After the court filed its opinion, findings of fact and decree on December 1st, 1936 petitioner Phoenix Fi-

nance Corporation on December 19, 1936 moved the court to vacate and set aside its decree, findings and all of its orders on the ground that the jurisdiction of the court depended upon diversity of citizenship; that petitioner and respondent were adverse parties and were both citizens of Delaware and and that therefore no diversity of citizenship existed upon which jurisdiction in the suit was based. (F.R. 204-205) A resistance to this motion was filed by respondent bridge company and interveners. (F.R. 206-208)

Petitioner's motion was denied. (See opinion and order F.R. 208-211) A similar motion was filed bp the trustees (F.R. 215-216) which was overruled. (F.R. 411)

An appeal was taken to the Circuit Court of Appeals by the trustees and by petitioner F.R. 501-502). in which trustees and petitioner assigned the court's rulings on diversity jurisdiction as error. (F.R. 502, 503, 508, 509)

The Circuit Court of Appeals specifically passed on the question of jurisdiction stating: "The District Court acquired complete jurisdiction over the mortgaged property when the suit was commenced and the receiver took possession. (Citing) At that time before Phoenix became a party there was complete diversity of citizenship. Had Phoenix not become a party the court could have proceeded to final judgment, granting or denying foreclosure. It could have decided every issue, including the validity of

the trust deed and the amount of the debts secured thereby; and the decree would have been binding upon the bondholders without their presence as parties to the record. (Citing) * * Further, if the controversy between the two Delaware corporations should in any way be considered as a separate controversy involving only the validity of certain of the bonds, then it was ancillary to the foreclosure proceedings, and jurisdiction attached irrespective of citizenship, because the subject matter had been drawn into the federal court under the receivership before Phoenix became a party. (Citing) The court did not err in overruling appellants' attack on the jurisdiction." (F.R. 1694; 98 Fed. (2) 416 at 421)

Petitioner Phoenix then petitioned this Court for writ of certiorari. The first ground on petition for certiorari was that the Circuit Court of Appeals had exceeded its constitutional jurisdiction in pronouncing judgment on the merits of a controversy between citizens of the same state. (Petition for writ of certiorari No. 438 October Term 1938 page 2, *Phoenix Finance Corporation, Petitioner vs. Iowa-Wisconsin Bridge Company, et al.,* Respondents) The question of jurisdiction was fully argued in its brief in support of the petition. (S. C. pp. 16-22) Respondent in its brief on this petition fully responded to the argument of petitioner. (Respondent's brief S. C. pp. 16-19) This Court having denied certiorari (305 U. S. 650), a petition for rehearing was filed, in which the contention of petitioner as to jurisdiction was reasserted. (Petition for rehearing S. C. pp. 2-6) The

petition for rehearing was denied. (305 U. S. 676)

It therefore appears conclusively that the claim of petitioner of lack of jurisdiction in the federal courts was fully contested and decided by the District Court and the Circuit Court of Appeals and fully contested before this Court on application for writ of certiorari.

It has been settled by this Court that after a federal court has decided the question of the jurisdiction over the parties as a contested issue the court in which the plea of res adjudicata is made has not the power to inquire again into that jurisdictional fact. *Stoll vs. Gottlieb* 305 U. S. 165, 172.

This Court in that case said:

> "We see no reason why a court in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, would have jurisdiction of the subject matter of the litigation. * * * After a party has his day in court with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely re-tries the issue previously determined. * * * That a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation has been determined by this court in Forsyth vs. Hammond.

> * * * There are quasi-jurisdictional facts, diversity of citizenship, majority of litigants and jurisdiction of parties, a mere finding of which, regardless of actual existence is sufficient."

The Court finally held that since the question of jurisdiction over the subject matter was raised and determined adversely to respondent that determination was res adjudicata of that issue whether or not power to deal with the particular subject matter was strictly or quasijurisdictional.

A case cited by this Court in *Stoll vs. Gottlieb*, supra, where the answer to the plea of res adjudicata was that a diversity of citizenship had not existed in the first case is *Des Moines Navigation and Railroad Company vs. Iowa Homestead Company*. 123 US. 552. A suit having been brought by the Homestead Company in the state court to recover certain taxes which were the subject of litigation between the same parties in an earlier case in a federal court in which the decision had been adverse to the Homestead Company, when the Navigation Company pleaded the earlier decree in bar to the later action the reply was made that the Courts of the United States which had rendered the earlier decree had no jurisdiction of the suit and no legal power or authority to render the decree or judgment. The basis of the assertion was that the earlier suit had been originally instituted by the Homestead Company, an Iowa corporation, against various non-resident defendants and the Navigation Company, also an Iowa corporation, and removed to the Federal Court, in which all defendants including the Naviga-

tion Company appeared, filed answers and defended, and that citizens of the same state being opposed to each other, the adjudication was void for want of jurisdiction. The court said:

> "Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called upon to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizen of Iowa and the citizens of New York, its final decree in the suit could have been reversed or appealed, if erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that court was the exercise, and the rightful exercise, of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this Court on appeal after the Circuit Court entertained the suit, and this Court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree cannot, in the light of prior adjudications on the same general question, be deemed a nullity. It was at the time of the trial of the present case in the court below a valid and subsisting prior adjudication of the matter in controversy, binding on these parties and a bar to this action."

See also

Dowell vs. Applegate 152 U. S. 327, 340

Chicago Life Ins. Co. vs. Cherry, 244 U. S. 25.

Petitioner is now seeking to have re-heard what was determined on its petition for certiorari in the federal case in 1938. The Circuit Court of Appeals rendered its decree in that case on August 11, 1938 and this Court denied certiorari December 5, 1938 and rehearing January 3, 1939 and the three months' time alloted for the filing of a petition for certiorari for such purpose has long since expired and jurisdiction for the consideration thereof ended.

Toledo Scale Co. vs. Computing Scale Co. 261 U. S. 399, 43 S. Ct. 458.

II.

THE FEDERAL COURT HAD FULL AND COMPLETE JURISDICTION

Petitioner in order to support its claim on the question of jurisdiction now advances the argument that as to the issue of mortgage foreclosure there was undisputed jurisdiction because of the diversity of citizenship between the trustee complainants and the respondent, but that as to the issues relating to the validity and consideration of the bonds and their underlying considerations federal jurisdiction never existed from the beginning. (Petitioner's Brief in Support p. 31).

(a) *The deed of trust and bonds in controversy and the underlying considerations therefor were inseparable.*

The bill asked (1) determination of the amount due on the bonds and coupons, (2) a short day to pay, and (3) then strict foreclosure without redemption and deficiency judgment.

The bonds and their underlying considerations and

deed of trust were inseparably involved in one controversy. As stated in *Carpenter vs. Longan* 16 Wall. 271:

> "Upon bill of foreclosure * * * account must be taken to ascertain the amount due upon the instrument secured by the mortgage * * * The note and mortgage are inseparable; the former as essential the latter as an incident. * * * The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents."

The bonds were all covered by one and the same purported mortgage deed of trust. Fraud in the inception and want of consideration were charged as to all of the bonds and the mortgage. That constituted the basis of one inseparable alleged cause of action and controversy. And that was the controversy of which the Federal Court had jurisdiction from the very beginning.

(b) *The trustees were the only indispensable parties complainant.*

The mortgage deed of trust provided that the trustees upon request of one-fourth in amount of the bonds in case of default upon being indemnified to their satisfaction, "shall proceed to protect and enforce their rights and the rights of the bondholders under this indenture by suit or suits in equity or at law, by foreclosure or any other appropriate remedy," and "that no holder of any bond or coupon secured hereby shall have any right to institute any suit, action or proceeding in equity or at law, for the foreclosure of this indenture or for the execution of any trust thereof, or for the appointment of a receiver, or for any other remedy here-

under" except in case the trustees after notice and demand refuse to act. (R. 37, 38, 43)

On request of Phoenix Finance Corporation the trustees filed the original bill, and in said bill, and thereafter, appeared by counsel selected by Phoenix Finance Corporation and prosecuted the action at all times diligently. (F.R. 1478-1482, 790, 791, 794, 11)

Prior to the filing of petition of intervention the bill and answer of the defendant had been filed and a receiver had been appointed of all the bridge company's property of every description, and the same was in legal custody of the court. (F.R. 160-162, 166, 68-72)

If this suit, instead of being a suit by trustees to foreclosure the trust deed had been a suit by the bridge company or its stockholders representing the corporation to set aside the trust deed and bonds, the only necessary and indispensable parties to the suit would have been the trustees.

In the case of *Kerrison vs. Stewart,* 3 Otto 155, it was held:

> "Where a trustee represents his beneficiaries in all things relating to the trust property, they are not necessary parties to a suit against him by a stranger *to enforce or declare void the trust.*" (Italics ours)

The Court said:

> "In such cases the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party * * * The principle which underlies this has always been applied in proceedings relating to railway mortgages,

> where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessity of that class of cases, but an old one, long in use in analogous circumstances and found to be well adapted to the protection of the rights of those interested in such securities."

In *Mercantile Trust Co. vs. Schlafly* (C.C.A. 8) 299 F. 202, which was a suit by a trustee in bankruptcy against a trustee under a mortgage securing bonds to recover money collected by defendant for interest on bonds within four months prior to bankruptcy, and not disbursed to the bondholders, it was claimed that the bondholders were necessary parties. The Court held that they were not; that they were all represented by the trustee.

In *Beals vs. Ill. M. & T. R. R. Co.*, 133 U. S. 290, the Court said:

> "Upon the facts thus established no ground is shown for maintaining the bill. The former judgment was rendered by a court of competent jurisdiction, in which not only the railroad company that issued the bonds, but the surviving trustee under the mortgage, made in the name of another company to secure payment of the bonds were made parties. *The bondholders were thus fully represented in that suit, and bound by the decree cancelling and annulling the bonds and mortgage.*" (Italics ours)

In *Elwell vs. Fosdick*, 134 U. S. 500, where a decree had been entered and a sale made and confirmed in a suit to foreclose a first mortgage on a railroad,

in which the trustee under second mortgage was made a party, and a release of errors in the proceedings executed by such trustee, the Court said:

> "The trustee represented the bondholders not only in the proceeding which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he bound them by his release of errors."

To the same effect see, *Manson vs. Duncanson,* 166 U. S. 533.

On the issues of fraud conspiracy, invalidity and want of consideration, Phoenix Finance Corporation, as well as the other bondholders, were represented by the trustees.

In the case of *Richter vs. Jerome,* 123 U. S. 233, 246 the Court said:

> "Something is also said in the argument about the equitable claims of the bondholders upon Ayer as the successor of Anthony, growing out of the false representations made to them as to the title of the lands covered by the mortgage when they paid the money and took the bonds; but as all such claims come from the mortgage, as to which, in all proceedings for foreclosure, they are represented by their trustees when its interests are not in conflict with theirs, all the equities now asserted were proper subjects for adjudication in the former suit, if they existed. They formed part and parcel of the security which was then foreclosed. * * *"

Also see,

Beals v. Ill. M. & T. R. Co., 123 U. S. 290.

A suit to foreclose a trust deed securing a bond issue must be brought in the name of the trustee,

and the fact that a beneficiary is a citizen of the same state as the grantor does not defeat the jurisdiction of the Federal Court if the trustee is a citizen of a different state. It is the trustee's citizenship that governs. The bondholders are not necessary parties to a suit brought by the trustee, and their citizenship is immaterial.

The trustees in the instant case, being trustees under a corporate mortgage or deed of trust securing the issue of bonds, were vested with express power to collect the debt and/or to enforce the security on default by foreclosure and sale and to apply the proceeds; were the only indispensable parties plaintiff in the suit to foreclose in the Federal Court, and it was not necessary that the bondholders be joined, since the trustees were not exceptionable and had not refused to execute the trust.

Federal Equity Rules Nos. 37 and 39;
Vose v. Bronson, 73 U. S. 452, 456;
Richter v. Jerome, 123 U. S. 233, 246;
Palmer v. Bankers & Trust Co. (C.C.A. 8), 12 F (2d) 747, 752;
Guaranty Trust Co. v. Chicago, M. & St. P. Ry. Co., 15 F. (2d) 434, 440 (D. C. N. D. Ill)
Smith v. Bell (C.C.A. 8) 217 F. 243;
Dodge v. Tulleys 144 U. S. 451;
Bullard v. Cisco, 290 U. S. 179;
Coal Co. v. Blatchford 11 Wall. 172;
Knapp v. Railroad Company, 20 Wall. 117;
Hamer v. N. Y. Ry. Co., 244 U. S. 266;
Mexican Central Ry. Co. v. Eckman, 187 U. S. 429;

Allen-West Commission Co. v. Brashear, (C.C. E.D. Ark.) 176 F. 119, 121.

The Circuit Court of Appeals in its opinion stated: (F.R. bottom p. 1692 top p. 1693)

> "One of the questions raised in connection with the matter of jurisdiction relates to the applicable law.
>
> "In so far as the right here involved is substantive it is controlled by the laws of Iowa and Wisconsin, in which states the property is situated. Section 10968 of the Code of Iowa of 1935 provides: 'A Trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute may sue in his own name without joining with him the party for whose benefit the action is prosecuted.' In the case of Tucker v. Silver, 9 Iowa 261, the Supreme Court of Iowa. said:
>
> " 'The general rule, independent of the Code. is that a trustee is a necessary party;' And it was held that the provisions of the code do not change the rule. See also: *Bennett Savings Bank v. Smith* 171 Iowa 405, 408; *In re Receivership of Selway Steel Post & Fence Co.,* 198 Iowa 950, 957-8; *Fransham v. Tow Bros.,* 196 Iowa 1082, 196 N. W. 71. The Wisconsin rule is the same. *Haynes v. Lewis,* 21 Wis. 663; *Milwaukee Trust Co. v. Van Valkenburgh* (132 Wis. 638) 112 N. W. 1083."

In substance the contention of the petitioner is this: That in any action to foreclose a deed of trust securing a bond issue, if the defense is asserted that the deed of trust and bonds are without con-

sideration or were conceived in fraud and the alleged fraud or want of consideration is that of a corporate bondholder, that corporate bondholder immediately becomes an indispensable party to the action, and if its residence be the same as that of the defendant, federal jurisdiction is automatically ousted. (Petitioner's brief pp. 31-32)

Carried to its logical limit the argument means that if there be 10,000 bondholders, who are not conceded to be innocent purchasers for value, and the defense of fraud or want of consideration be raised, they must all be made parties, because the result of a finding of fraud or want of consideration in the deed of trust and bond issue would necessarily result in the invalidation of the bonds held by them. The mere fact that one bondholder, as in this case, may own 90 per cent, puts it in no more favorable position than that of the holder of one bond. One of the very purposes of making mortgages securing bonds to trustees is to avoid any such absurd situations. If the contention of petitioner were sound a trust deed securing a railroad bond issue could never, as a practical proposition, be foreclosed in the federal courts if anyone asserted the defense of fraud or want of consideration. Such trust deeds would then have to be foreclosed in every state in which any part of the railroad company's property was situated or collection of the bonds attempted in the various states in which the bondholders resided. Such theory is wholly in conflict with the decisions of this Court pertaining to actions of this character and amounts to a gentle suggestion that

the federal courts ought to denude themselves of all power to act in such matters.

(c) *The joining of petitioner did not oust jurisdiction.*

The joining of a party not indispensable whose citizenship is not diverse, does not oust the jurisdiction of the court. As stated by the trial court (F.R. 209-10, 19 Fed. Supp. 127, 141:

> "In a suit to foreclose a corporate mortgage in a federal court by such a trustee with jurisdiction resting solely upon diversity of citizenship, the joining of a party not indispensable whose presence destroys such diversity does not oust the jurisdiction of the court. Under former rules and practice the doctrine was laid down in Wormley v. Wormley 8 Wheat. 421 (451), that the joining of a nominal or formal party did not in cases resting on diversity of citizenship oust the jurisdiction of a federal court. In a comparatively recent case and since it has been customary to classify parties in suits in equity in federal courts as indispensable and proper parties, the Supreme Court speaking through Mr. Justice Butler, said:
>
> " 'District Courts have jurisdiction if all the parties on one side are of citizenship diverse to those on the other side. Jurisdiction cannot be defeated by joining formal or unnecessary parties. The right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed *(Barney v. Latham* 103 U. S. 205, 215; Ex parte Nebraska, 209 U. S. 436, 444), and is not affected by the fact that one of the defendants is a citizen of the same state as the plaintiff, if the defendant is not an indispensable party to the controversy be-

tween plaintiff and defendant who are citizens of different states.' *Salem Trust Company v. Manufacturers' Finance Company,* et al., 264 U. S. 182 (189)

"I conceive the same rule to be applied in the following cases:

Blytheville, L. & A. S. R. Co. v. St. Louis-San Francisco Ry. Co., 33 F. (2d) 481 (C.C.A. 8);
Equitable Trust Co. v. Denney, 24 F. (2d) 169, (C.C.A. 7th Circuit);
Stewart v. Dunham, 115 U. S. 61;
Walden v. Skinner, 101 U. S. 577;
Korrison, Assignee v. Stewart, 93 U. S. 155;
McArthur v. Scott 113 U. S. 340, 396;
Rand v. Walker, 117 U. S. 340, 344;
McNutt v. Bland, 2 How. 9;
Bonnafee v. Williams 3 How. 574;
Wood, et al v. Davis, 18 How. 367;
Bacon v. Rives, 106 U. S. 99;
Maryland v. Baldwin 112 U. S. 490;
Wilson v. Oswego Township, 151 U. S. 56;
Construction Co. v. Cane Creek, 155 U. S. 283."

No exception was ever raised to the action of the trustees. The record shows that the trustees, at the request of the Phoenix Finance Corporation, promptly filed the original bill, they thereafter appeared by counsel selected by the Phoenix Finance Corporation, and diligently prosecuted the foreclosure suit at all times and stages. The provisions

of the trust deed above quoted expressly vest the trustees with sole power to foreclose in case of default, to effect sale, and to apply the proceeds and to procure a deficiency judgment.

The trustees were the only indispensable parties plaintiff. Phoenix Finance Corporation was fully represented in the litigation between the trustees. The joinder of it in the case did not oust the jurisdiction of the court, which was complete at the time petitioner was brought in.

The jurisdiction of the federal court depends on the state of things at the time the original action was brought, and after vesting it cannot be ousted by subsequent events. No change of the parties can affect that jurisdiction.

Mollan v. Torrance, 9 Wheat. 537;
Hardenberg v. Ray, 151 U. S. 112.

Thus where an action was brought in the State of Missouri by a citizen of Pennsylvania against a citizen of Missouri who was in possession of real estate, to recover such property, and the defendant being a tenant, on his motion the landlord a resident of Pennsylvania was made a co-defendant, the Court held that that did not interfere with the jurisdiction of the court already established, but was incidental to the jurisdiction acquired, and ancillary to it.

Phelps vs. Oakes, 117 U. S. 236;

See also:

Stewart v. Dunham, 115 U. S. 61-65;

Cella v. Brown (C.C.A. 8), 144 F. 742, cer. den. 202 U. S. 620;

Egyptian Novaculite Co. v. Stevenson (C.C.A. 8) 8 F. (2d) 576, 579;

Sioux City Terminal Ry. and Warehouse Co. v. Trust Co. of North America (C.C.A. 8), 82 F. 124, aff. 173 U. S. 99;

Wieland v. Pioneer Irrigation Co. (C.C.A. 8), 238 F. 519, aff. 259 U. S. 498.

In the case of *Supreme Tribe of Ben Hur vs. Cauble et al* 255 U. S. 356, 41 S. Ct. Rep. 338 this Court held:

> "(Quoting from syllabi) The jurisdiction of the United States District Court over a suit against a resident defendant, brought by non-resident members of a class for the benefit of all in the class, is not defeated by the representation by non-resident plaintiffs of members of the class who were citizens of the same state as defendant."

Also see:

Stewart vs. Dunham 115 U. S. 61, 5 S. Ct. 1163.

(d) *The District Court acquired complete jurisdiction when the receiver took possession.*

The court, when petitioner was brought in, not only had acquired jurisdiction between the original parties, but had appointed a receiver of all the bridge company's property, and the property was in the actual possession and custody of the court. This drew to it the right to decide all conflicting claims

to its ultimate possession and control and all persons claiming to be entitled to participate therein might come in or be brought in under the jurisdiction acquired between the original parties by ancillary or supplemental proceedings, even though such jurisdiction would have been lacking if such proceedings had been independently prosecuted.

Morgan's Co. v. Texas Central Ry., 137 U. S. 171, 201;
Krippendorf v. Hyde, 110 U. S. 276;
Palmer vs. Texas, 212 U. S. 118;
Central Union Trust Co. v. Anderson County Tex. 268 U. S. 93;
Marcell v. Engebretson (C.C.A. 8) 74 F. (2d) 93.

(e) *The cases cited by petitioner are not in point.*

The petitioner wholly disregards the doctrine of representation firmly established by the decisions of this court and none of the cases cited by it are similar in facts to the instant case.

The case of *Indianapolis vs. Chase National Bank* 62 S. Ct. 15, 86 L. ed. 27, Adv. Ops. Nos. 10-13, October Term 1941 is a case relating to the original alignment of parties acting in their own behalf and does not relate to the doctrine of representation.

It is not a case in which the Federal Court had full and complete jurisdiction of the subject matter and of the parties before the introduction of the party whose presence is now claimed to have disturbed the jurisdiction. The Indianapolis Gas Co. was not a party which was fully represented by

trustees before its entry into the case or one, the presence of which in the case was not necessary. It is not a case such as the original federal case here involved, where the trustees, indispensable parties, brought the suit and petitioner was a beneficiary whose joinder did not defeat jurisdiction. It is not a case such as the original case in the federal court in which even though Phoenix had not been made a party the Court could have proceeded to final judgment and decided every issue including the existence of indebtedness, nor is it a case in which the subject matter having been drawn into the Federal Court before Phoenix became a party the proceedings as to it were merely ancillary.

In the Indianapolis Case the former denial of the writ of certiorari was in the same case and the raising of the question of jurisdiction in the application for the second writ in the case was not an attempt to collaterally attack a decision in an independent suit which had been finally determined by the denial of a petition for a writ in which the question of jurisdiction now attempted to be raised was specifically presented. The Indianapolis Case was decided upon the circumstances of an extraordinary case while the situation here is a common one, the law as to which is well settled.

Finally, it is not a case in which the question of jurisdiction had been contested, tried out and specifically determined and a collateral attack on the jurisdiction attempted in another later suit where the first decree was pleaded in bar.

The cases cited by petitioner are all cases in which

(a) It appeared from the complaint or answer filed that there was a substantial and indispensable interest in the lawsuit owned and held by a party not a party to the record and that adjudication could not be made of the controversy presented without the presence of such party unrepresented in the pending litigation; or

(b) Cases in which the introduction of an indispensable party holding an interest in the lawsuit, wholly unrepresented, ousted the jurisdiction of the court.

Neither situation exists in the instant case.

Salem Trust Company vs. Manufacturers' Finance Co., et al., 264 U. S. 182.

(f) The Iowa decisional law is not as claimed by petitioner.

Petitioner cites a fraudulent conveyance case, Clemens v. Elder, et al., 9 Iowa 272, wherein Elder conveyed lands to James H. Grower and received a bond for the re-conveyance of the same upon the payment of $3,750.00 within one year as evidenced by two notes payable to J. H. Grower Bros. & Co., and an action was brought to set aside this deed as a fraudulent conveyance and it appears that James H. Grower in fact held the title for the firm to which the notes were payable, or their endorsers, or both, none of whom were made parties. The court

held the proper parties had not been made defendants. In that case there was no trust deed such as in the instant case authorizing the trustee to represent all parties interested. That case has no similarity in facts to the case at bar and obviously is not an authority for the proposition for which petitioner cites it.

Petitioner cites *Miller v. Mahaffy,* 45 Iowa 289, wherein plaintiffs claimed to be the owners of land by virtue of written contract with the Burlington & Missouri R. R. Co., that said contract of purchase was taken in the name of Robert Miller, and that he held the title as trustee for plaintiffs and not as owner, and that he fraudulently assigned the contract to defendant Mahaffy, who had knowledge thereof, and there was evidence tending to show that plaintiffs and Miller owned this land in common; that the sale to Mahaffy was not without consideration. Miller, although named as a party defendant, had not been served with notice of the action. The court held that under such circumstances there was a defect of parties, and that the court could not proceed at all until Miller was made a party. There was no instrument by virtue of which Mahaffy might act for Miller in the protection of his interests, and the case is not an authority for petitioner's contention as to representation.

Petitioner cites *Iowa Title & Loan Co. v. Clark Bros., et al* 213 Iowa 875, 237 N. W. 336. In that case there were a series of notes secured by the same mortgage and the court held that one or more

of the note owners might sue and recover at law and later enforce the mortgage lien, while the holders of other notes might in the first instance avail themselves of their remedy by foreclosure. The case does not hold that a person may have trustees proceed with the foreclosure of a mortgage or deed of trust to recover the claimed debt secured thereby, and having been defeated on the ground that there was no consideration and no debt existed, proceed to sue again on the same pretended indebtedness, nor does it hold that a person may sue on notes and having been defeated on the ground that there was no consideration, that he may then sue in the name of trustees for the foreclosure of a mortgage claimed to secure the same notes.

In *Iowa Title & Loan Co. v. Clark,* 215 Iowa 929, 247 N. W. 211, in which under a trust agreement giving to the trustee powers similar to but not as elaborately stated as the powers set forth in the trust deed in this case, the trustee brought on action to foreclosure a mortgage as to certain of the notes for which the mortgage was security, and an action at law to recover upon the remaining notes. The Iowa court specifically held that the owners of the notes having constituted the plaintiff their trustee to enforce collection of the debt represented by the notes, and the Iowa law (Section 10968, Codes 1927 and 1931) providing that a trustee of an express trust * * * may sue in his own name without joining with him the party for whose benefit the action is prosecuted, the right to prosecute the action on the notes was in the trustee, and stated:

> "Under our statute the plaintiff, as such trustee of an express trust, had authority to bring action against the defendants in its own name without joining with it the beneficial owners of the notes. Aside from its duty as trustee to distribute the proceeds of the trust fund to those entitled thereto, the plaintiff was in no different position than if it were prosecuting this action as the absolute owner of the notes."

In the case of *McPherson v. Commercial Building & Securities Co.*, 206 Iowa 562, 218 N. W. 306, the question as to the powers of a trustee was passed upon. The court, in discussing the relationship between a trustee, occupying position similar to that of the trustees in this case, and the bondholders, said:

> "In the deed of trust set forth in the petition, the trustee was the pledgee of the securities, and was the proper representative of all the bondholders, with full power both under the trust deed and under the statute, Sections 12364-12371, Code 1924. Plaintiff's bond carried the written attestation of the trustee. *There was no lack of privity as between the holder of the bond and such trustee.*" (Emphasis supplied.)

Section 10968 of the Code of Iowa of 1921. 1935 and 1939 provides:

> "Plaintiff as legal representative. An executor or administrator, a guardian. a trustee of an expess trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with

him the party for whose benefit the action is prosecuted."

Also see *Hoskins vs. Hotel Randolph Co.* 206 Iowa 932, 211 N. W. 423.

Federal Land Bank of Omaha vs. Jefferson, 229 Iowa 1054, 295 N. W. 855, cited by petitioner is not in point. In that case the prayer of the petition asked only for judgment in rem and the party permitted the attachment to expire and jurisdiction to be lost thereby, while in the foreclosure suit the service was personal and deficiency judgment and other equitable relief were prayed.

II.

PETITIONER WAS FULLY REPRESENTED BY THE TRUSTEES IN THE FORECLOSURE CAUSE.

A number of cases have been cited under the preceeding point of this brief which also bear hereon and for brevity we do not repeat them, but confine ourselves to additional cases bearing on the subject.

In *Stoddard v. Thompson, et al.,* 31 Iowa 80, at p. 82, the court said:

"One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein."

In *Souffront v. La Compagnie Des Sucreries, etc*, 217 U. S. 495, 54 L. ed. 856, 30 S. Ct. 608, 612, this court said:

> "The persons for whose benefit, to the knowledge of the court and of all parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party as he would be if he had been a party to the record. *Lovejoy v. Murray 3 Wall. 1, 18 L. ed. 129.*"

See:

Anderson v. Watt, 138 U. S. 694, 704, 705.
Robbins v. Chicago City, 4 Wall. 657, 71 U. S. 657.
Lovejoy v. Murray, 3 Wall. 1, 70 U. S. 1, 19.
Fulsom vs. Quaker Oil & Gas Co. (8 CCA), 35 Fed. (2d) 84, 90.
Louisville & Nashville Ry. Co. v. A. L. Schmidt, 177 U. S. 230.
Schroeder v. State Bank, 144 Iowa 42.
Plumb v. Crane, Adm'r. etc., supra, 123 U. S. 560.

Petitioner asserts in its brief that the Supreme Court of Delaware was in obvious and demonstrable error in predicating its decision that petitioner was

represented in the foreclosure cause upon express authority appearing in the trust deed.

A very brief examination of the trust deed will demonstrate the incorrectness of this assertion. Section 10 Article IV of the trust deed (F.R. 41-42) specifically provides that in case of default by the company "the trustees in their own names or as trustees of an express trust shall be entitled to recover judgment for the whole amount so due and unpaid." It further provides that they shall be entitled to recover such judgment either before or after or during the pendency of any proceeding for the enforcement of the lien of the indenture upon the trust property and that their right to recover such judgment shall not be affected by any sale thereunder or by the exercise of any other right, power or remedy for the enforcement of the provisions of the indenture, or for the foreclosure of the lien thereof. It further provides that in case of a sale of the mortgaged property and of the application of the proceeds to the payment of the debt that they in heir own names as trustees of an express trust shall be entitled to enforce payment of and to receive the amount remaining due and unpaid upon any and all bonds issued thereunder and then outstanding for the benefit of the holders thereof and shall be entitled to recover judgment for any portion of the debt remaining unpaid with interest.

Section 13 of the same Article (F.R. 43-44) provides that no holder of any bond or coupon shall ave any right to institute any suit, action or pro-

ceeding in equity *or at law,* for the foreclosure of the indenture or for the execution of any trust thereof or for the appointment of a receiver *or for any other remedy* thereunder except in the case of refusal or unreasonable delay on the part of the trustees to act after notice.

The fact that the bondholders might under certain circumstances be permitted to act is wholly immaterial in view of the fact that they did not so act and that the trustees were given full authority to proceed not only to foreclose the mortgage but to recover the amount of indebtedness, if any due.

The decision of the Delaware Supreme Court was therefore exactly in accord with the terms of the trust indenture.

Petitioner cites *Mackay vs. Randolph Coal Company* 8 CCA, decided May 4, 1910), *178 Fed.* 881. That case involved a question of merger and was decided under the earlier equity rules, which were amended before the trial of the present case as set above set forth, and that case has been overruled and is not now an authority for the proposition for which it is cited, as has been later held by the court that rendered it.

In *Lane vs. Equitable Trust Company of New York* (Nov. 24, 1919, 8 CCA), 262 Fed. 918. cert. den. 252 U. S. 578, wherein the mortgage deed of trust, securing the bonds, contained the same provisions as those in the instant case, quoted above, the court held

that the complainant trustee was entitled to a deficiency judgment to pay the indebtedness secured by the deed of trust.

Equity Rule 10 as amended May 4, 1925, 28 U. S. C. A., following section 723, provides:

> "In suits for the foreclosure of mortgages or for the enforcement of other liens a decree may be rendered for any balance found to be due over and above the proceeds of the sale or sales; and execution may issue for the collection of the same as is provided in rule 8 when the decree is solely for the payment of money. Such a deficiency decree may be so rendered and enforced whether the plaintiff owns the debt or is a trustee or agent for another or others who own it, as often is true when the debt is evidenced by notes or bonds. Where the plaintiff is such trustee or agent, any money collected on the execution shall be paid to him as such representative, and he shall pay it to the owner of the debt if there be only one, and if there be more shall distribute it pro rata among them according to their respective interests."

In the case of *Fidelity-Philadelphia T. Company v. Hale & Kilburn Corp.* (Sept. 16, 1937) 24 Fed. Supp. 3 at 11, after referring to the fact that Equity Rule 10 was amended on May 4, 1925 to read as above quoted, the court said:

> "It will be noted that the amendment of May 4, 1925, which is the rule now in force, besides expressly giving a trustee, who does not actually own the debt the right to recover a deficiency judgment, omitted the words, 'to the plaintiff'

from the clause 'any balance that may be found due to the plaintiff'. How important this omission is can be seen from the majority and dissenting opinions in *Lane v. Equitable Trust Co.*, 8 Cir., 262 F. 918, 922.

"It is beyond question that the amendment of 1925 to Rule 10 gives a trustee for bondholders under a corporate mortgage a standing in court as a party to recover a deficiency judgment in a foreclosure proceeding without regard to whether or not he is vested with the ownership of the debt, right to sue or chose in action. The rule does not change substantive rights. It does not affect what was said in *Continental-Equitable Title & Trust Co.*, supra, to the effect that actual ownership of the debt does not vest in the trustee until demand. It is procedural, and merely makes an agent a proper party to recover a judgment, not for himself as owner of the debt, but for his principals. The rights of the real owners of the debt are guarded by the last sentence of the rule. Moreover, prior to the Amendment of 1925, the question had been raised in *Mackay v. Randolph Coal Co.*, supra, whether the parties by agreement could give to a third party (the trustee) the right to sue to recover a debt without actual ownership of the debt. It seems more than likely that the Amendment of 1925 was promulgated to meet the difficulties which the extremely technical position adopted by the courts in the cases referred to had thrown in the way of corporate foreclosures for the benefit of bondholders. At any rate, those decisions, in view of the changed equity rule are no longer controlling. I therefore conclude that failure to make a demand does not bar the right of the trustee to deficiency decrees in this suit."

Also see:

Continental Equitable Title & Trust Co. vs. National Properties Co. 273 Fed. 967.
Central National Bank vs. Bateman & Companies, Inc., 15 Del. Ch. 31, 31 Atl. 202.
McPherson vs. Commercial Building and Securities Co. 206 Iowa 562, 218 N. W. 306.
Thomas vs. Brownsville Ry. Co. 109 U. S. 522.
Section 10, 968 Iowa Code 1935, quoted supra.
Rule 37 Federal Equity.
Rules of Procedure (28 U. S. C. A. following Sec. 73).
Hartford Ins. Co. vs. Southern Pacific Co., 227 U. S. 207, 47 S. Ct. 357 at 360.

Petitioner cites *In Re Eberling* (CCA 9) 123 Fed. (2) 520, which involved only the right to file claims in bankruptcy and bears no similarity to the case at bar.

Petitioner cites *In Re Eberling* (CCA 9) 123 Fed. (CCA 2) 143 Fed. 805, wherein the trustees under the trust indenture had no power to enforce any of the payments due, and as stated by the court "its powers as trustee were more limited than those of the ordinary trustee for bondholders upon a deed or mortgage." And the case did not involve any such trust indenture as involved in the instant case and the opinion was rendered prior to the amendment to Equity Rule 10 and it does not appear that in the jurisdiction where that case was tried there was a statute such as *Sec. 10968 Iowa Code 1935, quoted* supra.

Erratum: Page 85, line 21 should read: Petitioner cites National Salt Co. vs. Ingraham.

A reading of *Georgetown vs. Alexandria Canal Co.* 12 Pet. 91, 9 L. ed. 1012, will at once demonstrate its inapplicability to the circumstances of the case now being considered.

The petitioner at page 42 of its brief cites *Toucey vs. New York Life Ins. Co.,* (8 CCA) 102 Fed. (2) 16, but that case does not hold that both equitable and legal controversies presented may not be determined by a court of equity. On the contrary the court in the opinion at page 20 states:

> "Both of these claims were asserted and in controversy before it and the court of equity was called upon to decide upon both controversies. It did consider the evidence on both issues and we are cited to no case implying that a court of equity lacks power to fully and finally adjudicate all equitabe controversies presented by the pleadings and the evidence in a case within its jurisdiction. Its adjudication on each claim in controversy was equally conclusive and binding."

The same Court in the case of *First Trust & Savings Bank et al vs. Iowa-Wisconsin Bridge Company, et al* (8 CCA) 98 Fed. (2) 416, held that the consideration of the notes in controversy in the instant case were adjudicated in the foreclosure case. Instead of any such question being presented before the Federal Courts the claimed underlying considerations for petitioner's bonds were presented for adjudication and re-asserted before the Circuit Court of Appeals. By failing to raise

such question before the trial court it was waived, if it existed.

In *Deaton vs. Hollingshead* 225 Iowa 967, 282 N. W. 329 the Court said:

> "Code Section 12372 provides that a mortgage of real estate shall be foreclosed by equitable proceedings. Plaintiff in the foreclosure suit selected the equity forum for the adjudication of his rights and prayed not only for a money judgment, but also for foreclosure of the mortgage and appointment of a receiver. The court of equity had jurisdiction of the controversy and parties, and the action having been properly brought in equity, all issues, legal and equitable, are triable therein, and the court will determine the entire controversy." (Emphasis supplied)
>
> Also see *Armour & Company vs. Miller* (8 CCA) 91 Fed. (2) 521.

Thomas vs. Brownsville etc. R. Co. 109 U. S. 522.

is in point. In that case an action was filed for the foreclosure of a mortgage securing a bond issue. The bonds themselves were issued on account of a contract for the construction of the railroad. The court found as a fact that the bonds were invalid because the construction contract was fraudulent and therefore void. However, the court held that to the extent of the benefit conferred upon and received by the corporation in the construction of the road the bonds issued in payment thereof were not void, and that a decree for that amount should be allowed. This

case illustrates the point that in a suit to foreclose a mortgage or deed of trust securing a bond issue the court must inquire into the underlying considerations and determine whether a consideration exists, and this is what the Federal Courts did in the foreclosure suit.

See *Speers Sand and Clay Works, Inc. vs. American Clay Works* 20 Fed. (2) 333.

Petitioner at page 43 of its brief cites *Central Trust Company of New York vs. California & N. R. Co. 110* Fed. 70, and quotes from page 72 but omits stating what precedes and follows the quotation. That case involved the right of an individual bondholder to intervene in a suit by trustee to foreclose a mortgage securing bonds for the purpose of contesting the validity of certain bonds, where no answer had been filed by the defendant railroad company and the trustee was objectionable. The court held that the bondholder was entitled to intervene. No such exception was ever raised to the action or want of action of the trustees in the instant case. On the contrary, the record discloses that the trustees promptly at request of petitioner filed the original bill and thereafter appeared by counsel of petitioner's selection and prosecuted the suit at all times and stages diligently.

III.

THE FEDERAL COURTS HAD FULL AND COMPLETE JURISDICTION TO DETERMINE THE

MATTERS INVOLVED IN THIS CAUSE. THEY WERE FULLY WITHIN THE ISSUES AND WERE CONTROVERTED AND LITIGATED IN THE FEDERAL CAUSE.

(a) *As stated by the Supreme Court of Delaware the question of the consideration of the notes in suit as considerations for the bonds were fully within the issues in the foreclosure case.*

Reynolds, et al v. Stockton, 140 U. S. 254, cited by petitioner, bears no similarity to the instant case.

The case is similar to the class of cases where the plaintiff by his notice and pleadings asks for certain relief, and then on default or after answer, without further legal notice and without amendment, takes judgment based on different grounds than those alleged and for a wholly different amount in the absence of the defendant The court in the opinion states:

> "Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. * * * Here there was no appearance after the filing of the answer and no participation in the trial or other proceedings."

(b) Courts are not limited to the pleadings and the decree in order to determine the issues of a former case and the effect of the adjudication thereof.

Freeman on Judgments (5th Ed.), Vol. 2, Sec. 765, pp. 1618, 1620.

Freeman on Judgments (5th Ed.), Vol. 2, Sec. 769, p. 1630 and Sec. 771, p. 1638.

34 Corpus Juris, Sec. 1329, p. 921.

State of Oklahoma v. State of Texas, 256 U. S. 70, 88, in which the court said:

"What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties and the findings and opinion of the court."

Also see::

National, etc., Co. v. Oconto, 183 U. S. 216...

Sampson v. Jump, 188 Iowa 528, 175 N. W. 318.

Millie Mining Co. v. McKennie (6CCA), 172 Fed. 42.

Loeb v. Columbia Township Trustees, 179 U. S. 472, 481.

"Where the judgment or decree in a case has been reviewed on appeal or the decision or judgment of an appellate court is relied upon as res adjudicata the opinion of the court and the record in the case may be examined to determine what was adjudicated and whether the adjudication was on the merits. A bill of exceptions or statement for the purposes of appeal may be looked to."

Freeman on Judgments (5th Ed.), Vol. 2, Sec. 772, p. 1642.

(c) *Doctrine of res judicata does not depend upon affirmance and denial of a particular proposition in the pleadings of the former suit, but on the fact that the proposition has been fully and finally investigated and tried.*

In *King City, Mo., for use and benefit of United States Cast Iron Pipe and Foundry Co. v. Southern Surety Company* (Sept. 29, 1931), 212 Iowa 1230, 238 N. W. 93, wherein the federal court had entered judgment denying material man recovery on contractor's bond, it was held *res judicata* of a suit by city for benefit of material man to recover on same bond and of legal issues as to effect of bond as well as equitable issues regarding reformation of bond. The court said:

> "This court is committed to the doctrine that *res adjudicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings of the former suit, but upon the fact that it has been fully and fairly investigated and tried therein. See *Reynolds v. Lyon County*, 121 Iowa 733, 96 N. W. 1096, 1099. We there said: 'The prevailing rule is so well expressed in Black on Judgments No. 614, that we quote with approval: "The doctrine of res judicata does not rest upon the fact that a particular proposition has been affirmed and denied in he pleadings, but upon the fact that it has been fully and fairly investigated and tried; that the parties have had an adequate opportunity to say and prove all that they can in relation to it; that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. Now, these con-

ditions are fully met when any question, though foreign to the original issue, becomes the decisive question—the turning point—in the case. In that event it will receive just as full and exhaustive an examination as if it were the sole subject - matter of a distinct and independent suit, and therefore should be considered as much settled by the judgment as if it stood alone as the issue in the case. For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict of (or) finding, whether it was statedly and technically in issue or not." ' (Citing authority)

"Matters which follow by necessary and inevitable inference from the judgment-findings or determinations of the court, in relation to the subject-matter of the suit which are necessarily implied from its final decision, as being determinations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words. Sec. 34 C. J. 923.

"Applying the foregoing rules to the proposition confronting us, it seems quite clear that the plaintiff is estopped from maintaining the action now attempted to be litigated, by the former adjudication of the federal court."

(d) *The rule of the national courts and of the courts of Iowa as to what constitutes res judicata are the same.*

Petitioner cites *Baltimore Ship Co. v. Phillips*, 274 U. S. 316. In that case the court said:

"If upon the *same cause of action,* the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit *between the same parties or those in privity with them,* not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action the prior judgment or decree operates as an estoppel only as to matters actually in issue or *points controverted,* upon the determination of which the judgment or decree was rendered." (Emphasis supplied)

Also see:

Werlein v. New Orleans, 177 U. S. 390, 397, 20 S. Ct. 682, 44 L. ed. 816.
Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 378.
Davis v. Brown, 94 U. S. 423.

In *Bagley vs. Bates,* 223 Iowa 836, 273 N. W. 924, at 927, the court said:

"It is the general rule of law that 'a judgment on the merits rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to *every other matter which might with propriety have been litigated and determined in that action.* * * *

This is a well-established rule, of almost universal application, that a judgment, if rendered by a court of competent jurisdiction, on the merits, constitutes a complete bar and estoppel to a

subsequent action between the same identical parties based upon the same claim or demand or cause of action. *This is not only true with reference to matters in issue, but it is true as to all matters incident to or essentially connected with the subject of the action which might have been put in issue and adjudicated.* This rule is so familiar it needs no citation of authorities to sustain it." (Emphasized in opinion)

Also see *Rew v. School District*, 125 Iowa 28, 98 N. W. 802.

Petitioner on page 46 of its brief asserts that there was no pleading in the federal case which put in issue the validity or enforceability of the notes in suit. This assertion is without foundation. This assertion is without foundation. The bill in the Federal Court asserted that all of the bonds had been issued for good and valuable consideration and were outstanding in the hands of divers owners and holders for value and prayed that an account be taken of the amount due on the bonds and for deficiency judgment, appointment of receiver and general equitable relief. (F.R. 6, 10, 11, 12) The answer of the bridge company denied the

validity of the trust, alleged that there was a good defense to all or part of the bonds, prayed that plaintiff be required to make a complete showing as to consideration received by the bridge company in each and every instance for the bonds. (F.R. 62-68) The petition of intervention, which was ordered to be taken as an answer to the bill of complaint, alleged that the bonds and the mortgage were

fraudulent and without consideration, invalid and void, prayed that complainants' bill be dismissed * * and for general equitable relief. (F.R. 73-83) Phoenix' answer to petition of intervention disclaimed knowledge of matters alleged, asserted it owned and held for value a large amount of the bonds of the bridge company and offered to do equity. (F. R. 91-92)

On the one hand under the pleadings the complainants asked for an account of the pre-existing debt and its recovery and on the other hand the petition of intervention asked that the bill be dismissed. Clearly under such allegations there can be no question but what the issue was clearly drawn as to the existence of the pre-existing debt claimed in support of the bonds, for which the security of the mortgage was given.

Phoenix' president, John A. Thompson, on part of complainants, testified as to such claimed pre-existing debt and notes now in suit as consideration for the bonds. (F.R. 542, 562, 563, Ex. A-2 HEB 843, 844, Ex. 28 HEB 829, 986). Following the Master's Report the trustees filed exceptions to the Master's Report (F. R. Supp. 1-14) and adopted the exceptions to the Master's Report filed by petitioner, Phoenix. (F.R. Supp. 7) Petitioner, Phoenix' exception 6 again specifically put forward the notes involved here and their claimed underlying consideration as consideration for the bonds and specifically set forth the claimed underlying considerations of these notes as consid-

eration for the bonds (F. R. Supp. 48-49)

Under those issues and points controverted if the federal court had found a pre-existing debt or obligation on these notes in support of the bonds and rendered decree against the bridge company for the amount of such notes there could have been no question but what such decree would have been binding as res adjudicata on the bridge company. On the other hand when the court decreed as it did that the "bill of plaintiffs be dismissed as to plaintiff Phoenix Finance Corporation, and the prayer of the bill be denied," except insofar as it provided for other bondholders, that was an equally binding adjudication against the trustees and Phoenix as to any claimed indebtedness. (F.R. 204)

A judgment or decree of dismissal renders all the issues and points controverted in the case res adjudicata and constitutes a bar to any subsequent suit for the same cause of action.

Hickey vs. Johnson (8 CCA) 9 Fed. (2) 498, 501.

Petitioner Phoenix asserts that it was necessary that there be a pleading of counterclaim or set-off in the federal case. Such contention is without merit since that is only a collateral attack on the judgment and a matter which could only be claimed on direct appeal from such judgment on an assignment of error.

Root vs. Woolworth 150 U. S. 401, 414, 14 S. Ct. 136.

Thornton vs. Carter (8 CCA) 109 Fed. (2) 316, 320.

Cooper vs. Reynolds 10 Wall. 308, 316, 77 U. S. 308.

Manson vs. Duncanson 166 U. S. 533, 547, 17 S Ct. 647.

Petitioner Phoenix on first appeal to the Circuit Court of Appeals assigned as an error "that the decree is beyond the scope of the pleadings and parties and of the proper evidence under the pleadings," etc. (F.R. 526-527) That assignment of error was overruled by the Circuit Court of Appeals' affirmance of the case and such decision is res adjudicata. (F. R. y695, 1709, 98 Fed. (2) 416, 421) Petitioner having litigated the question of consideration and the court having jurisdiction of the subject matter and of the parties any claimed error in the decision could only be reviewed on appeal and unless modified on appeal the decision is final even if it were erroneous.

34 C. J. p. 901, Sec. 1311.

American Express Co. vs. Mullins 212 U. S. 311, 29 S. Ct. 381.

Roche vs. McDonald 275 U. S. 499, 48 S. Ct. 142.

In *57 C. J.* p. 389, Sec. 40:

"Although the matter could not be interposed as a set-off because no action could be main-

tained thereon it may still be available by way of defense."

In *49 C. J.* p. 310, Sec. 380:

"Where matter relied upon is strictly a defense in whole or in part to plaintiff's cause of action, it need not be set up as a cross demand."

A court of equity, or a court possessing equitable jurisdiction, has inherent power as a part of its general jurisdiction, to allow or compel a set-off independent of statute. 57 C. J. 361; *Scott v. Armstrong,* 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059. The right to set-off formerly regarded as attaching to the remedy only and not to the debt itself, is now recognized, particularly by the federal courts, as a matter of substantive justice affecting substantive relations between the parties. *The Gloria,* 286 Fed. 188, 192; Questions of C. C. A., answered 266 U. S. 328, 45 S. Ct. 112, 69 L. ed. 313.

In the federal courts set-off is not confined to matters arising out of the contract or transaction sued on. *Central Appalachian Co. v. Buchanan* (CCA 6th), 90 Fed. 454, (opinion by Judge Lurton,) concurred in by Judge Taft).

IV.

THE NOTES IN SUIT WERE DETERMINED IN THE FEDERAL CASE NOT TO CONSTITUTE A PRE-EXISTING DEBT SUPPORTING THE BONDS

FOR THE SECURITY OF WHICH THE MORTGAGE WAS GIVEN.

Petitioner Phoenix Finance Corporation took over as the successor in the fraudulent scheme all the assets of the Phoenix Finance System, Inc., with notice of all the plans of its predecessor adopting the results of its activities. (Court's Finding No. 41 F. R. 402) The record shows that bridge company bonds held by Phoenix Finance Corporation were by resolution of the board of directors of the bridge company while controlled by John A. Thompson, president of both Phoenix Finance System, Inc. and Phoenix Finance Corporation and his associates on March 7. 1932 directed to be delivered to the Phoenix Finance System, Inc. in payment of alleged obligations of the bridge company to the Phoenix Finance System, Inc. found to be fraudulent and without consideration by the court in the original trial. (Court's finding No. 40, F. R. 201-202, 979-982)

The same Thompson-Phoenix controlled directors of the bridge company mentioned in the Court's finding No. 40 by resolution on July 8, 1933 directed $21,100 additional bonds of the bridge company to be delivered to the Phoenix Finance Corporation as collateral security for the payment if obligations originating with the Phoenix Finance System, Inc. and to pay interest on fraudulent bonds and some other items found to be without consideration by the court on the original trial. (F.R. consideration by the court on the original trial. (F.R. 1027-1029, 203, 204, 1704-1705) The notes in suit are

included in these alleged obligations. The record shows that the Phoenix Finance Corporation took up the conspiracy where the Phoenix Finance System, Inc. left off. The bond issue and mortgage securi it were all the result of a single deliberate scheme to obtain possession of the bridge company's prop and to freeze out its stockholders, starting with the $50,000 mortgage and culminating with the foreclosure proceedings and participated in by both Phoenix Finance System, Inc. and its successor Phoenix Finance Corporation. (Court's opinion F. R. 157, 412-413, opinion C. C. A. F. R. 1708)

Where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains, or the degree of his activity in the scheme * * * It is not necessary that they be in pari delicto. It is enough that each was at some time and in some degree a party and an aider of the improper transaction.

Fletcher Cyc. of Corp. (Perm. Ed.) Vol 1, Sec. 198, pp. 650-655;

McCandless v. Furlaud 296 U. S. 140, 56 S. Ct. 41;

Irving Trust Co. v. Deutsch (CCA) 73 Fed (2) 121, 123;

Jackson v. Smith 254 U. S. 586, 41 S. Ct. 200, 65 L. ed. 418.

John A. Thompson, president of the Phoenix Finance Corporation, was also president of the bridge company, and he and other directors of Phoenix Finance Corporation, who were also directors of the bridge company, controlled and dominated the bridge company to the disadvantage of the bridge company, said John A. Thompson being of dominating influence and character. (F.R. 129-135; F.R. bottom p. 163 top p. 164; court's opinion F. R. 156-179; court's findings of fact F. R 179-202, especially F.R. 188.) And at the time of the alleged payments and the execution of the alleged notes and at the time of the delivery of the bonds, they were in duty bound merely to credit any payments claimed to have been made by Phoenix to or for the bridge company on the amount due the bridge company from Phoenix.

In *Geddes vs. Anaconda Copper Co.* 254 U. S. 590, 41 S. Ct. 209, the court said:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden upon those who would maintain them to show their entire fairness and where a sale is involved *the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character.* This court has been consistently emphatic in the application of this rule. which, it has declared, is founded in soundest morality, and we now add in the soundest business policy."

Such transactions are presumptively fraudulent.

Corsicana National Bank vs. Johnson, 251 U. S. 68, 40 S. Ct. 82.

Thompson and petitioner Phoenix, dominating and controlling the bridge company, owed a fiduciary duty to the bridge company, in the performance of which the law forbade them to take any notes and then bonds as collateral thereto for any payments claimed to have been made by Phoenix to the bridge company or for it while Phoenix was indebted to the bridge company in a far greater amount, and having acted in a dual capacity the notes and bonds were presumptively fraudulent.

In *Thompson on Corp.*, Vol. 3, Sec. 2289, it is said:

> "But the rule is also well settled that where, under proper pleadings, fraud or illegality in the issue or sale of such bonds or coupons has been shown, then the holder or indorsee, before he is entitled to recover, must prove that he is a holder for value; *and the mere possession of the paper* under such circumstances is *not sufficient.* The reason of this rule is that the proof that the instrument was unlawful or fraudulently issued overcomes the presumption of good faith on the part of the holder, and then casts upon him the burden of proving that he was a purchaser for value before maturity and without notice of any defense. * * * "

Petitioner Phoenix not only urged the notes in suit as consideration for the bonds, but also the claimed underlying considerations of such notes, as shown by

Phoenix' exception No. 6 adopted by the trustees (F. R. Supp. 48-49, 7). All the evidence bearing thereon was presented and analyzed in detail and from it the court found that there in fact was no consideration for the notes and bonds; that Phoenix in fact at the time of the amounts claimed as consideration therefor was indebted to the bridge company in a far greater amount; for $14,000 of stock of the bridge company received by Phoenix without consideration and for other items due the bridge company, and that in law any payments made by Phoenix were merely a partial payment on its indebtedness to the bridge company, and that no consideration existed for the notes involved in this action. (F.R. 156-204 and especially 177 and 204)

V.

SUCCESSFUL DEFENSE TO ACTION ON COLLATERAL BARS AN ACTION ON THE DEBT.

As is said in *Jones on Mortgafes,* 8th Ed., Sec. 316, at p. 289:

> "A debt, either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. 'A mortgage is in equity, a hypothecation or pledge of property for the security of a debt. There must be a debt, or there can be no security for its payment.' Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie."

Also see *Carpenter v. Logan*, 16 Wall. 261, 21 L. Ed. 313.

The rule is stated as follows in 34 C. J. P. 853:

"A successful defense on the merits in an action either on the principal debt or the collateral will bar an action on the other."

In support of this are cited among other cases, *Johnson v. Forstall, et al.*, 3 La. Ann. 466, and *Sykes v. Gerber*, 98 Penn. Stat. 179.

In the last cited case there had been a suit on a promissory note, with judgment for defendant. An action was then commenced on the original debt. The court assumes that the note had not been given in payment of the debt but as security. The opinion then states:

"The original claim and the note were by the same parties, for the same consideration and payment of either would have satisfied both. A judgment in favor of the creditor upon either would be a bar to a recovery on the other. And a judgment for the debtor in an action which finally disposed of the note for equally good reason is a complete defense against a suit upon the account or claim which the note represented."

The situation as to the purported notes involved in the Delaware action is exactly parallel. The $20,100 bonds were given as security for certain notes. There was and could be no consideration for them except the alleged indebtedness represented by the notes. When the court found that there was no con-

sideration for the bonds, it necessarily found that there was no valid indebtedness and therefore no consideration for the notes representing the purported indebtedness.

The rule stated as quoted above from Corpus Juris is fully sustained by this Court in *Chew v. Brumagen,* 13 Wall. 497, 20 L. ed. 663, in which the converse situation existed, i. e., the original action was on the indebtedness and the second action an attempt to foreclose the mortgage. This case is also valuable authority on the proposition that where a trustee of an express brings an action the cestui que trust is bound by that judgment not only in the state where the judgment was rendered, but in all other states.

In that case a bond for $3,500.00 was secured by a mortgage. The bond was assigned by the obligee to another, who brought suit on it in the State of New York. A defense of fraud was interposed. A verdict was returned for the plaintiff, but for only $2,091.25. Judgment was entered for this amount and paid by the maker of the bond. The bond and mortgage were then assigned to a third party who attempted to foreclose the mortgage in the State of New Jersey. The mortgagor set up in defense the previous suit on the bond in New York, the judgment and the payment of the judgment, claiming that the debt, which the mortgage was given to secure w thereby satisfied, and consequently that the mortgage was satisfied. His plea of res adjudicata was

rejected by the courts of New Jersey and an appeal taken to this court.

With reference to the right of the trustee to sue, he being the only indispensable party, and as to a judgment in an action by him being binding upon his cestui que trust, the court cited the statute of the State of New York, which is practically identical to Code of Iowa 1935, Section 10968, supra, and held that neither the cestui que trust nor his personal representative was a necessary party to the suit brought upon the bond by the trustee. The court said:

> "They were represented by the trustee, and the judgment which he recovered settled finally against them, and claiming under them, as well as against Wood (the trustee) the amount recoverable."

The court further held that the judgment in the original suit determined finally the amount of the debt for which the bond was given and neither the cestui que trust nor his administratrix nor any subsequent assignee of either of them could maintain that the bond was not wholly extinguished in the judgment.

Also see:

Kenyon v. Wilson, The Same v. Baker, 78 Iowa 408

U. S. v. California & Oregon Land Co., 192 U. S. 355, 24 S. Ct. 266;

Beloit v. Morgan, 7 Wall. 619, 19 L. ed. 205.

Thompson v. Roperts Bros., 65 U. S. 14, 16 L. Ed. 648.
Schroeder v. Bank, 144 Iowa 42.

The fact that a party to a judgment is merely a "proper" and not a "necessary" party does not relieve him from the conclusive effect of the adjudication.

Freeman on Judgments (5th Ed.) Vol. 1, Sec. 430, p. 936.

One, though not a party, is bound by the judgment in a suit prosecuted at his instance and on his behalf and for his benefit.

Freeman on Judgments (5th Ed.) Vol. 1, sec. 430, p. 638.
Souffrant v. LaCompagnie & Des Sourcreries, 217 U. S. 475.
Stoddard vs. Thompson 31 Iowa 80, 82.

In *Plumb vs. Crane, Adm'r. etc.* 123 U. S. 560, where one holding the title to certain lands in trust was made a party to a suit concerning the title to properly pleaded as res adjudicata in an action beployed counsel and filed answer in the name of the trustee it was held that the decision in that case was tween the same plaintiff and the cestui on the same properly leaded as res adjudicata in an action besubject matter.

CONCLUSION.

The record shows that this case has been carefully considered by the Supreme Court of Delaware and that that court's decision is in harmony with the previous decisions of this Court. The questions presented by the petition have been determined by this court in its prior decisions and the petition presents no new question of general imortance.

We respectfully submit that the petition for writ of certiorari should be denied.

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